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High Hopes: Why Courts Should Fulfill Expectations of Lifetime Retiree Health Benefits in Ambiguous Collective Bargaining Agreements

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HIGH HOPES: WHY COURTS SHOULD FULFILL EXPECTATIONS OF LIFETIME RETIREE HEALTH BENEFITS IN AMBIGUOUS COLLECTIVE BARGAINING AGREEMENTS

Abstract: Since World War II, employer-provided medical benefits for retirees have been a common feature of collective bargaining agreements. Due to dramatic increases in the cost of these benefits over the last decade, many employers have unilaterally modified or terminated these benefits, leaving retirees without their expected health insurance. This Note argues that until Congress acts to resolve this situation, federal courts must act to protect retirees' benefits. The Note concludes that because the retirees' expectations of continued benefits are reasonable in light of the union workplace and such an approach is consistent with federal labor policy, courts should apply a rebuttable presumption that such benefits vest once retirees prove the agreement providing them is ambiguous, and then allow employers to present evidence that overcomes the presumption.

INTRODUCTION

Benjamin Disraeli observed that "[w]hat we anticipate seldom occurs; what we least expected generally happens."[1] Although she lives over a century after Disraeli's statement, Elaine Russell would probably agree, considering she never expected to rely on a free food bank after retiring from four decades of work at Sears-Roebuck.[2] Similarly, Richard Mebane is unlikely to argue with this unsettling observation considering he never expected he would need to stretch his supply of medicine by skipping prescribed doses.[3] Albert Shaklee would no doubt concur with the observation because he could never have

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[1] BENJAMIN DISRAELI, HENRIETTA TEMPLE bk.ii, ch.4 (1837), *reprinted in* JOHN BARTLETT'S FAMILIAR QUOTATIONS 434 (Justin Kaplan ed., 16th ed., 1992).

[2] *See* Ellen E. Schultz, *This Won't Hurt: Companies Transform Retiree-Medical Plans into Source of Profits*, WALL ST. J., Oct. 25, 2000, at A1.

[3] Schultz, *supra* note 2, at A1. Mr. Mebane, however, will take his medicine every day if he begins to feel light-headed. *Id.*

anticipated that he would need to work the midnight shift at a parts-grinding factory after leaving his accounting career.[4]

What these and thousands of other retirees *actually* expected were lifetime medical benefits from their former employers during retirement.[5] Instead, however, many of the nation's employers have disappointed these expectations through substantial cuts and modifications to the medical benefits they provide to qualified retirees.[6] While retirees anticipated their years of service to their former employers would entitle them to permanent medical insurance coverage, they suddenly face tremendous medical and financial hardships they never expected.[7] Retirees confronted by these new hardships have sued their former employers, claiming that their benefits could not be unilaterally modified because the collective bargaining agreements between their employer and their union contractually vested their benefits.[8] Unfortunately for both the retirees and their former employers, Congress and the courts have been unable to arrive at a clear, uniform solution to this problem.[9]

Much of the disagreement is due to the inability of the United States Courts of Appeals to agree on whether the retirees' disappointed expectations of lifetime benefits are relevant.[10] While admitting that the retirees' stories are compelling, some courts claim to be

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[4] *Id.*

[5] *See* Catherine L. Fisk, Lochner *Redux: The Renaissance of Laissez-Faire Contract in the Federal Common Law of Employee Benefits*, 56 OHIO ST. L.J. 153, 166 (1995); *see also* Nathanael R. Berneking, Comment, *Don't Mow Over the Yard-Man Inference: Guarding Against Improper Modification of Welfare Benefits Provided in A Collective Bargaining Agreement*, 45 ST. LOUIS U. L.J. 261, 268 (2001); Janilyn S. Brouwer, Symposium Note, *Retiree Health Benefits: The Promise of a Lifetime?*, 51 OHIO ST. J.L. 985, 999–1000 (1990).

[6] Schultz, *supra* note 2, at A1. These employers include Walt Disney, Campbell Soup, McDonnell-Douglas, Merck, Procter & Gamble and Anheuser-Busch. *See id.*

[7] *See id.*

[8] *See, e.g.*, Anderson v. Alpha Portland Indus., Inc., 836 F.2d 1512, 1515 (8th Cir. 1988); United Steelworkers v. Textron, Inc., 836 F.2d 6, 7 (1st Cir. 1987); UAW v. Yard-Man, Inc., 716 F.2d 1476, 1478 (6th Cir. 1983). The term "to vest" means "to render [benefits] forever unalterable." Sprague v. General Motors Corp., 133 F.3d 388, 400 (6th Cir. 1998). Because this Note focuses on collective bargaining agreements, "vested" further refers to "benefits that continue beyond the expiration of the agreement creating them." Rossetto v. Pabst Brewing Co., 217 F.3d 539, 543 (7th Cir. 2000), *cert. denied*, 121 S.Ct. 1191, 1191 (2001).

[9] *See Rossetto*, 217 F.3d at 543 (characterizing rulings of federal courts as "all over the lot"); Am. Fed'n of Grain Millers v. Int'l Multifoods Corp., 116 F.3d 976, 980 (2d Cir. 1997) (discussing disagreement between courts over how to address claims when contracts are ambiguous).

[10] *Compare* Keffer v. H.K. Porter Co., 872 F.2d 60, 64 (4th Cir. 1989), *and Yard-Man*, 716 F.2d at 1482, *with* UAW v. Skinner Engine Co., 188 F.3d 130, 140 (3d Cir. 1999), *and Anderson*, 836 F.2d at 1517.

constrained by legal rules of contract interpretation and require employers to provide lifetime benefits only if they clearly and expressly agreed to do so in the collective bargaining agreement.[11] To promote the understandings memorialized in the agreements, these courts frequently find that, absent express language unambiguously vesting retiree benefits, employers are free to modify medical benefit programs as market conditions change.[12] Thus, extra-contractual employee expectations are irrelevant to such courts and cannot be used to aid plaintiffs.[13]

The subject of retirement benefits raises numerous legal issues.[14] While employers provide two types of retirement benefits to workers, this Note focuses solely on modifications to employer-provided retiree welfare benefits.[15] Although welfare benefits are broadly defined,[16] the most important retiree welfare benefits are medical insurance, life insurance and coverage for prescriptions, hospital care and surgery

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[11] *See Skinner Engine*, 188 F.3d at 139; Pabst Brewing Co. v. Corrao, 161 F.3d 434, 442 (7th Cir. 1998); *Anderson*, 836 F.2d at 1517; *see also* Donald T. Weckstein, *The Problematic Provisions and Protection of Health and Welfare Benefits for Retirees*, 24 SAN DIEGO L. REV. 101, 132 (1987) (viewing contract doctrine to prevent vested benefits); Gregory Parker Rogers, Comment, *Rethinking Yard-Man: Fundamental Contract Principles in Retiree Benefits Litigation*, 37 EMORY L.J. 1033, 1066–67 (1988) (arguing benefits do not continue absent language specifically stating that they do).

[12] *See Skinner Engine*, 188 F.3d at 141; Bidlack v. Wheelabrator Corp., 993 F.2d 603, 608 (7th Cir. 1993).

[13] *See Skinner Engine*, 188 F.3d at 140–41; *Corrao*, 161 F.3d at 442; *Anderson*, 836 F.2d at 1517.

[14] For example, courts must determine whether an agreement is ambiguous and therefore may be clarified using extrinsic evidence. *See generally* Alison M. Sultenic, *Promises, Promises: Using the Parol Evidence Rule to Manage Extrinsic Evidence in ERISA Litigation*, 3 U. PA. J. LAB. & EMP. L. 1 (2000); *see also* Rogers, *supra* note 11, at 1061–65. Courts may also need to decide if quasi-contractual claims such as promissory estoppel or equitable estoppel can be used to protect retiree benefits. *See* Fisk, *supra* note 5, at 170; Steven J. Sacher & David Pickle, *Litigation Involving Retiree Welfare Benefits*, A.B.A. CTR. FOR CONT'G LEGAL EDUC. NAT'L INST., Z-31, Z-41–43 (1997). Even if the courts decide that benefits are "vested," they must determine whether benefits can be fixed at the amount when the employee retires or whether they must "ratchet" up as benefits for active employees improve. *See Bidlack*, 993 F.2d at 614 (Easterbrook, J., dissenting); Weckstein, *supra* note 11, at 130.

[15] The other type of employer-provided benefits are traditional pensions, which are cash payments from a trust fund operated by the employer that guarantee retirees income after they leave the workforce. *See* Weckstein, *supra* note 11, at 109. These benefits are fully protected by federal statute and will not be considered here. *See infra* text accompanying note 114.

[16] The Employment Retirement Income Security Act (ERISA) defines employee welfare benefits as "medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services." 29 U.S.C. § 1002(1) (2000).

for retirees and their dependents.[17] The scope of this Note is limited to situations in which the retiree health benefits were conveyed through collective bargaining agreements.[18] Most importantly, this Note discusses the extent to which courts should protect retiree expectations of lifetime medical benefits when the collective bargaining agreement granting the benefits is ambiguous or silent as to their duration.[19]

While additional empirical research is necessary to confirm its arguments, this Note suggests that, until recently, continued welfare benefits for retirees were a social norm of the unionized workplace that both employers and employees accepted.[20] Part I reviews the recent trends in retiree benefits that have affected this issue and demonstrates the long history of these benefits in unionized workplaces.[21] Part II looks at relevant United States Supreme Court decisions and federal statutes that have shaped the current litigation.[22] This section also shows the deep division this issue has created in the federal courts by discussing the differing views United States Courts of Appeals have expressed regarding the protection of the expectations of retirees and employees.[23] Part III explores employee expectations of continued benefits and seeks to determine if it is appropriate for courts to consider them in benefits litigation.[24] Particularly because the claims at issue arise in the unique context of collective bargaining where unions represent employees, it argues that courts should consider the workers' expectations in benefit-termination litigation.[25] Part IV then considers whether a rebuttable presumption that benefits vest is compatible with Congress's national labor policies.[26] Ultimately, it concludes that because expectations of continued benefits are rea-

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[17] *See* Seth Kupferberg, *Double Effects in Economics and Law, with Special Reference to ERISA*, 73 OR. L. REV. 467, 486 (1994).

[18] Courts generally hold that retiree health benefits not provided through a negotiated collective bargaining agreement will be treated differently than those conveyed under a collective bargaining agreement in a unionized workplace. *See Rossetto*, 217 F.3d at 543–44. In these cases, employers generally prevail because courts are less likely to find that employers who grant benefits unilaterally intend to bind themselves to perpetual obligations. *See* Edward Lee Isler & Mark Snyderman, *Bidlack v. Wheelabrator: Revisiting the Chaos of Retiree Medical Litigation*, 7 BENEFITS L.J. 25, 39 (1994).

[19] *See infra* notes 251–416 and accompanying text.

[20] *See infra* notes 295–303 and accompanying text.

[21] *See infra* notes 30–68 and accompanying text.

[22] *See infra* notes 69–123 and accompanying text.

[23] *See infra* notes 124–250 and accompanying text.

[24] *See infra* notes 251–370 and accompanying text.

[25] *See infra* notes 332–370 and accompanying text.

[26] *See infra* notes 371–416 and accompanying text.

sonable in light of the union workplace and such an approach is consistent with federal policy, courts should apply a rebuttable presumption that such benefits vest once retirees prove the agreement providing them is ambiguous, and then allow employers to present evidence that overcomes the presumption.[27] Despite arguments against such an approach,[28] courts are more likely to reach a fair and appropriate result if they consider the bargaining context and protect worker expectations.[29]

I. Trends in Retiree Health Benefits

After World War II, health and retirement benefits became widespread because unions became interested in gaining such plans for their members and pressed for these benefits in collective bargaining negotiations.[30] As a result of union interest and the process of collective bargaining, retirement and health benefits became nearly twice as common for unionized workers as for the general working population, thus establishing such benefits as a fundamental characteristic of the unionized workplace.[31] By the 1960s and 1970s, many employers agreed to provide retiree health benefits because it was relatively inexpensive for them to do so.[32] In 1962, for example, employer-provided health insurance accounted for only 2.7% of the typical private employer's total costs for employee compensation.[33] Additionally, the value and availability of retirement medical benefits generally remained constant or improved with each new agreement during the 1960s and 1970s.[34] While a majority of collective bargaining agree-

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[27] *See infra* notes 407–416 and accompanying text.

[28] *See infra* notes 209–246 and accompanying text.

[29] *See infra* notes 251–416 and accompanying text.

[30] Sumner H. Slichter, James J. Healy & E. Robert Livernash, Impact of Collective Bargaining on Management 403 (1960).

[31] *See id.* at 404.

[32] *See* Kupferberg, *supra* note 17, at 486.

[33] *See* Census Bureau, Statistical Abstract of the United States 241 (87th ed. 1966) [hereinafter Statistical Abstract 1966]. The maximum benefit paid out under nearly 75% of contracts was less than $2,000. *See* Bureau of Nat'l Affairs, Basic Patterns in Union Contracts 44:6 (5th ed. 1961) [hereinafter Basic Patterns, 5th ed.].

[34] *See, e.g.*, Pabst Brewing Co. v. Corrao, 161 F.3d 434, 435 (7th Cir. 1998) (stating agreements from 1953 to 1984 included more and better welfare benefits for both active employees and retirees); Bidlack v. Wheelabrator Corp., 993 F.2d 603, 605 (7th Cir. 1993) (describing language relating to retiree benefits in collective agreements between 1965 and 1986 to be materially identical); Roth v. City of Glendale, 614 N.W.2d 467, 468–69 (Wis. 2000) (considering agreements between 1972 and 1995 using same language for welfare benefits and no substantial changes limiting benefits occurred until 1989).

ments in the early 1960s did not provide post-retirement medical benefits, the number of contracts that did was increasing rapidly.[35] By 1980, over half of private collective bargaining agreements offered welfare benefits that continued into retirement.[36]

Beginning in the 1980s, the cost of medical benefits for retirees first surpassed and ultimately dwarfed the rate of general inflation.[37] The general inflation rate as measured by the Consumer Price Index (CPI) from 1977 to 1987 was about 87%.[38] During that same period, personal health care costs for those sixty-five and older increased by 258%.[39] This dramatic surge in medical costs, coupled with increased economic competition from foreign manufacturers, prompted many employers to reduce costs to avoid bankruptcy or plant closings.[40] As part of these cost-cutting measures, some struggling employers reduced retiree welfare benefits for the first time.[41] The modifications ranged from modest changes like higher co-payments or deductibles, lower lifetime caps on benefits, and increased reliance on managed care techniques, to unprecedented attempts to terminate retiree medical benefits completely.[42] The situation for some employers was so dire that even these efforts failed to maintain their economic viability.[43]

The situation was fundamentally altered in the early 1990s as employers braced for the impact of Financial Accounting Standard 106 (FAS 106), which was adopted by the Financial Accounting Stan-

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[35] *See* BASIC PATTERNS, 5th ed., *supra* note 33, at 44:6. For example, the number of agreements offering post-retirement benefits increased by one third between the late 1950s and the early 1960s. *Id.*

[36] *See* BUREAU OF NAT'L AFFAIRS, BASIC PATTERNS IN UNION CONTRACTS 43 (10th ed. 1983) [hereinafter BASIC PATTERNS, 10th ed.].

[37] *See* Kupferberg, *supra* note 17, at 487.

[38] *See* CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 469 (112th ed. 1992) [hereinafter STATISTICAL ABSTRACT 1992]. The CPI states the change in prices for a group of goods as measured by the Department of Labor's Bureau of Labor Statistics. *See id.* at 465. The rate of inflation can be determined by comparing the percent change in the CPI between different time periods. *See id.* at 467.

[39] Michael S. Melbinger & Marianne W. Culver, *The Battle of the Rust Belt: Employers' Rights to Modify the Medical Benefits of Retirees*, 5 DEPAUL BUS. L.J. 139, 140 (1993).

[40] *See* Weckstein, *supra* note 11, at 102.

[41] *See* Brouwer, *supra* note 5, at 986 n.19 (reporting that 39% of employers had changed coverage in the late 1980s).

[42] *See* Sacher & Pickle, *supra* note 14, at Z-32.

[43] *See Corrao*, 161 F.3d at 437 (closing plant even after benefits' termination).

dards Board (FASB).[44] Effective in late 1992, the new rule required employers to recognize the expected cost of retiree benefits for current and future retirees in the current year rather than in the year those costs were actually incurred.[45] In other words, employers needed to "reflect on their balance sheets the present value of the estimated future costs for retirees' medical benefits."[46] Because it arrived when the annual increase of health care costs for private employers was estimated at approximately 20%,[47] FAS 106 required employers to report huge future liabilities on their financial statements.[48] Many companies decided that these benefits were simply too expensive and pointed to the large costs to justify their termination of medical coverage for retired employees.[49]

Sustained reductions, modifications, and terminations have altered the benefits of American retirees dramatically, and, while these alterations have occurred over the last fifteen years, the change has come most rapidly within the last decade.[50] For example, according to data compiled by the Bureau of Labor Statistics (BLS), 64% of large- and medium-sized private employers provided life insurance benefits to retirees in 1981.[51] By 1986, that percentage had decreased only slightly to 59%.[52] In the 1990s, however, the percentage of employers

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[44] *See* Sultenic, *supra* note 14, at 15. FASB is a private organization that promulgates rules for the preparation of financial reports and uniform accounting standards. UAW v. Skinner Engine Co., 188 F.3d 130, 136 n.4 (3d Cir. 1999).

[45] *See* Sultenic, *supra* note 14, at 15.

[46] Wise v. El Paso Natural Gas Co., 986 F.2d 929, 932 (5th Cir. 1993).

[47] *See* Bureau of Nat'l Affairs, *Employer Health Care Costs Rising At 21 Percent Rate, Report Says*, DAILY LAB. REP., Jan. 14, 1991, at A-3 [hereinafter *Employer Health Care Costs*] (citing increase in costs between 1987 and 1989). Employers' healthcare costs per employee also increased 23% from 1990 to 1992. *See* Tamara E. Russell, *Trav'lin Light: Early Retirees and the Availability of Post-Retirement Health Benefits*, 22 AM. J.L. & MED. 537, 539 (1996) (reporting employer health costs rose from $3,217 in 1990 to $3,968 in 1992).

[48] *See generally* Amanda Bennett, *Firms Stunned by Retiree Health Costs*, WALL ST. J., May 24, 1988 (reporting employers' future liabilities for healthcare in 1988 totaled 12% of their payrolls and such costs would reduce profits by several billion dollars).

[49] *See* Schultz, *supra* note 2, at A1. Ironically, however, employers found that they greatly exaggerated the cost of these benefits and never actually encountered the huge costs they predicted. *Id.* In fact, some employers' profit margins increased as a result of the adjustments they needed to make on their financial reports to reflect the lower costs. *See id.*

[50] *See infra* notes 51–57.

[51] *See Current Labor Statistics*, MONTHLY LAB. REV., Apr. 1997, at 73 [hereinafter *CLS* 1997].

[52] *See id.* After the 1986 survey, the BLS changed the definition of large and medium employers to include employers in all industries employing 100 or more workers. *See id.* at 73 n.1.

offering that benefit declined precipitously to 33% in 1997.[53] Also in 1997, only 19.5% of the nation's employers offered health insurance programs that continued to cover retirees after age sixty-five.[54] In the early 1990s, 59% of private employers offered such continued benefits.[55] Additionally, while 69% of remaining employer-provided medical plans require participants to contribute to their plans, only one third of employees were required to contribute to their benefits prior to the mid-1980s.[56] Moreover, the amount of this contribution has doubled during the past decade—from about $20 per month in 1988 to nearly $40 per month in 1997.[57]

Whether retirees themselves or their former employers cover retiree medical costs, paying for medical care poses a tremendous challenge, considering that the current cost of healthcare for Americans over age sixty-five is $5,864 per year.[58] Furthermore, while the yearly change in the cost of medical care between 1993 and 1999 averaged roughly 4.5%,[59] health costs are expected to rise by more than 10% in coming years.[60] Personal healthcare costs for retirees are also likely to be substantial because retirees who live to age sixty-five can expect to live for an average of eighteen additional years.[61] Because the median yearly income of American males over age sixty-five is $18,166 per year, there is legitimate concern that years of high medical bills might

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[53] *See Current Labor Statistics*, MONTHLY LAB. REV., Sept. 1999, at 75 [hereinafter *CLS* 1999].

[54] CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 119 (120th ed. 2000) [hereinafter STATISTICAL ABSTRACT 2000].

[55] *Employer Health Care Costs*, *supra* note 47, at A-3 (reporting survey of over 900 employers' medical plans).

[56] *CLS* 1999, *supra* note 53, at 75. It was not until 1991, for example, that more than 50% of employees were required to contribute to their health benefits. *Id.* While these data are based on employer-provided plans for all employees, both active and retirees, they accurately reflect the availability and terms of retiree welfare benefit plans because many collective bargaining agreements stated that the retirees' benefits are to be equal to the benefits provided to active employees. *See* UAW v. Yard-Man, Inc., 716 F.2d 1476, 1480 (6th Cir. 1983).

[57] *CLS* 1999, *supra* note 53, at 75.

[58] OLDER AMERICANS 2000: KEY INDICATORS OF WELL-BEING, FEDERAL INTERAGENCY FORUM ON AGING-RELATED STATISTICS 40 (2000) [hereinafter OLDER AMERICANS 2000]. The costs also grow significantly in the years after age sixty-five, as the average annual cost of caring for those ages seventy-five to seventy-nine is $9,414. *See id.*

[59] *See* STATISTICAL ABSTRACT 2000, *supra* note 54, at 487.

[60] Andy Miller, *Employer Survey: Costs Sharply Rise for Health Benefits*, ATLANTA CONST., Dec. 12, 2000, at E1. (citing survey of over 3,300 employers nationwide).

[61] OLDER AMERICANS 2000, *supra* note 58, at 22. This was an increase from the 1990 Census. *See id.*

eradicate a person's savings.[62] While retirees older than age sixty-five are eligible for Medicare, that program only covers about fifty percent of an individual's health costs.[63] Retirees on Medicare must still seek supplemental insurance to cover the cost of prescription drugs and long-term hospital care.[64]

Alternatively, employers who are required to pay for their retirees' lifelong medical costs would be responsible for covering what Medicare does not.[65] Providing health benefits to Medicare-eligible retirees in 1997 cost employers $1,910 per retiree.[66] In some cases, employers' healthcare liabilities can equal 20% to 40% of their net worth.[67] Considering the life expectancies of today's retirees, employers could face the difficulties imposed by a program covering such high costs for perhaps as many as twenty years.[68]

II. The Legal Background of Benefits Termination Litigation

A. *Federal Statutes and Supreme Court Decisions Affecting Benefits Litigation*

Once employers began to unilaterally modify retiree medical benefits in the mid-1980s, retirees and their former unions jointly sued to maintain them.[69] While no previous Supreme Court decisions or federal statutes directly governed these suits, some prior law affected how federal courts would address their legal claims.[70] The Court and Congress established principles in the 1960s and 1970s that continue to impact benefits termination litigation today.[71]

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[62] *See* Statistical Abstract 2000, *supra* note 54, at 473. For women above age sixty-five, the challenge seems even greater as their median income in 1998 was $10,504. *See id.*

[63] *See* Berneking, *supra* note 5, at 268.

[64] *See id.*; *see also* Kupferberg, *supra* note 17, at 486.

[65] Bureau of Nat'l Affairs, *Retiree Benefits: Employee Contributions and Managed Care Help Employees Cut Retiree Health Expenses*, Daily Lab. Rep., June 10, 1998, at A-11 (citing survey of 300 employers).

[66] *See id.* One area of particular concern is the cost of prescription drugs for retirees, which are yet to be covered by Medicare and are estimated to cost employers 23.4% more in 2001 than in 2000. *See* Carlos Tejada, *Work Week*, Wall St. J., July 18, 2000, at A1.

[67] *See generally* Bennett, *supra* note 48.

[68] *See* Older Americans 2000, *supra* note 58, at 22 (anticipating health costs for retirees would continue for, on average, eighteen years based on life expectancy).

[69] *See, e.g.*, Anderson v. Alpha Portland Indus., 836 F.2d 1512, 1515 (8th Cir. 1988); United Steelworkers v. Textron, Inc., 836 F.2d 6, 7 (1st Cir. 1987); UAW v. Yard-Man, Inc., 716 F.2d 1476, 1478 (6th Cir. 1983).

[70] *See* Rogers, *supra* note 11, at 1039–40.

[71] *See, e.g.*, UAW v. Skinner Engine Co., 188 F.3d 130, 140–41 (3d Cir. 1999); Int'l Ass'n Machinists v. Masonite Corp., 122 F.3d 228, 231 (5th Cir. 1997); Am. Fed'n of Grain Millers

For example, in 1971 in *Allied Chem. & Alkali Workers v. Pittsburgh Plate Glass Co.*,[72] the Supreme Court blocked retirees' claims that employers committed an unfair labor practice in violation of the National Labor Relations Act (NLRA)[73] when they unilaterally modified retiree welfare benefits.[74] In *Pittsburgh Plate Glass*, an employer decided to substitute its own coverage of retiree medical benefits with supplemental insurance provided through the then recently-enacted Medicare program, a national health program for seniors.[75] The union, which represented the retirees when they were active workers, claimed that because retirement welfare benefits were secured through a negotiated collective bargaining agreement, the NLRA required the employer to negotiate with the union before instituting any changes to the benefits plan.[76] The Court disagreed, however, and, in an opinion by Justice Brennan, established several guiding principles that have had a tremendous impact on subsequent litigation.[77]

In *Pittsburgh Plate and Glass*, the Court held that an employer has no obligation to bargain with the union over changes to retiree health benefits before implementing those changes.[78] Under section 8d of the NLRA, employers are required to bargain with unions over issues that the Court considers mandatory subjects of bargaining.[79] The Court, however, classified modifications to retiree welfare benefits as a nonmandatory, or permissive, subject of bargaining.[80] A unilateral change to retiree welfare benefits therefore cannot be remedied under the NLRA because an employer violates no provision of the NLRA by refusing to discuss the change with the union.[81] Moreover, the protections the NLRA provides to striking employees do not extend to

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v. Int'l Multifoods Corp., 116 F.3d 976, 979–80 (2d Cir. 1997); *Yard-Man*, 716 F.2d at 1484; Roth v. City of Glendale, 614 N.W.2d 467, 473 (Wis. 2000).

[72] *See* 404 U.S. 157, 157 (1971).

[73] 29 U.S.C. §§ 151–169 (2000).

[74] *See Pittsburgh Plate Glass*, 404 U.S. at 160.

[75] *Id.* at 161. The cost of the supplemental insurance was lower for the employer, but the retirees' benefits would have remained roughly unchanged. *See id.*

[76] *Id.* at 162.

[77] *See id.* at 188; *see also* Bidlack v. Wheelabrator Corp., 993 F.2d at 603, 609 (7th Cir. 1993); *Yard-Man*, 716 F.2d at 1479.

[78] *See Pittsburgh Plate Glass*, 404 U.S. at 182.

[79] *See id.* at 185.

[80] *See id.* at 188.

[81] *See id.*

those who strike over permissive subjects of bargaining.[82] After *Pittsburgh Plate and Glass*, employers have little fear a union will strike in response to a decision to modify or terminate retiree welfare benefits.[83]

Additionally, in *Pittsburgh Plate and Glass*, the Court found the interests of active employees and retirees so different that the union could not represent both groups in future negotiations.[84] In order to prevent internal conflicts that could impair the function of a union and disrupt the bargaining process, a union may only represent a "bargaining unit," consisting of a group of employees who share "substantial mutual interests in wages, hours, and other conditions of employment."[85] Because the Court considered the interests of retirees limited "only to retirement benefits, to the exclusion of wage rates, hours, working conditions, and all other terms of active employment," retirees and active employees lacked a mutuality of interests that allowed the union to represent them both.[86] Unions could not adequately advocate the interests of both groups because, while retirees would likely support a greater sacrifice of current wages for increased retirement benefits, active employees would prefer higher current wages.[87]

Moreover, by excluding retirees from the bargaining unit, the Court freed unions from any obligation to protect retirees' rights and interests in future rounds of collective bargaining.[88] Unions have a duty to fairly represent the claims and interests of all members of the

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[82] *See* NLRB v. Wooster Division of Borg-Warner Corp., 356 U.S. 342, 349 (1958) (holding insistence upon a non-mandatory subject of bargaining to point of strike unlawful); *see also* Detroit Typographical Union No. 18 v. NLRB, 216 F.3d 109, 117 (D.C. Cir. 2000) (noting National Labor Relations Board "has found that a strike or other economic action in support of a proposal on a nonmandatory bargaining subject is unlawful").

[83] *See Borg-Warner*, 356 U.S. at 349. As an example of how formal labor law does not represent the reality of the employment relationship, however, a strong union can occasionally threaten to strike against a vulnerable employer over retiree health benefits. Labor law or no labor law, the threat can cause the employer to deal with the union. *See* Rebecca Blumenstein, *Seeking a Cure: Auto Makers Attack High Health-Care Bills with a New Approach*, WALL ST. J., Dec. 9, 1996, at A1 (discussing UAW's threatened strike of U.S. auto makers for proposed changes to retiree medical benefits and auto makers' subsequent capitulation on issue to avoid strike).

[84] *See Pittsburgh Plate Glass*, 404 U.S. at 173.

[85] *See id.* This requirement seeks to promote the goal of efficient collective bargaining and ensures the union will speak with a coherent voice. *See id.* at 172–73.

[86] *See id.* at 173.

[87] *See id.*

[88] *See id.* at 180 n.20.

bargaining unit, but the duty extends to only current members.[89] *Pittsburgh Plate and Glass* also freed unions from a duty to involve retirees in union policy-making and decisions to accept new contracts because they are not members of the bargaining unit.[90]

While foreclosing an unfair labor practice claim, the Court provided an alternative to retirees who sought to protect their benefits.[91] In a footnote, Justice Brennan observed that "[u]nder established contract principles, vested retirement rights may not be altered without the pensioners' consent [and retirees could have a] federal remedy under section 301 of the Labor Management Relations Act for breach of contract if [their] benefits were unilaterally altered."[92] Justice Brennan's language indicated that vested benefits could be protected but gave no further guidance as to what contract principles he was referring or what constituted vesting.[93]

Subsequent retirees whose benefits were reduced and the unions that had negotiated the collective bargaining agreement therefore jointly sued employers in federal court under section 301 of the Labor Management Relations Act (LMRA)[94] for breach of contract.[95] Disputes under section 301 are subject to a substantial body of law that gives great authority to the federal courts.[96] Federal courts not only have jurisdiction to hear disputes under section 301, but are authorized "to fashion a body of federal common law for the enforcement of these collective bargaining agreements."[97] In the opinion of the Supreme Court, when Congress enacted section 301, it granted federal

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[89] *See* Ford Motor Co. v. Huffman, 345 U.S. 330, 337 (1953); Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192, 202–03 (1944).

[90] Edward B. Miller, *60 Years of Supreme Court Labor Law Decisions: A Look at Six Sample Years*, *in* THE NATIONAL LABOR RELATIONS ACT 60 YEARS LATER B-1, B-5 (1995).

[91] *See Pittsburgh Plate Glass*, 404 U.S. at 181 n.20.

[92] *Id.*

[93] *See id.*; *see also* Rogers, *supra* note 11, at 1041; Joseph R. Weeks, *Continuing Liability Under Expired Collective Bargaining Agreements Parts II & III*, 15 OKLA. CITY U. L. REV. 359, 579 (1990) (expressing uncertainty as to what contract principles *Pittsburgh Plate Glass* referred).

[94] 29 U.S.C. § 185(a) (2000). Section 301 and the rest of the LMRA were part of the Taft-Hartley Act of 1947, which modified the original NLRA. The pre-1947 elements of the NLRA are referred to as the Wagner Act and named after the Act's sponsor, Senator Robert F. Wagner. *See* Patrick Hardin, *Sixty Years of Supreme Court Jurisprudence: The Supreme Court Interprets the National Labor Relations Act*, *in* THE NATIONAL LABOR RELATIONS ACT 60 YEARS LATER A-1 (1995).

[95] *See, e.g.*, *Skinner Engine*, 188 F.3d at 137; *Masonite*, 122 F.3d at 230; *Yard-Man*, 716 F.2d at 1478.

[96] *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 354–55 (2d ed. 1994).

[97] *See* Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 450–51 (1957).

courts power to create substantive law so long as that law promoted the policies of the nation's labor laws.[98]

In 1960, in *United Steelworkers v. Warrior & Gulf Navigation Co.*, the Supreme Court defined and expanded the courts' power to fashion federal common law.[99] The case concerned a dispute over the interpretation of an ambiguous arbitration clause in a collective bargaining agreement.[100] The union sought to compel arbitration over the employer's decision to contract out work because it interpreted the contract to require such arbitration.[101] The employer, however, contended that the decision to contract out work was a function of management and that the agreement exempted such functions from an arbitrator's review.[102] To settle the dispute over interpretation, the Court began by stating that it perceived one of the goals of national labor policy to be the promotion of industrial stabilization through collective bargaining agreements.[103] Because the Court believed arbitration promoted that goal through peaceful settlements rather than strikes, it forced the employer to submit the issue to the agreement's arbitration procedure.[104]

Furthermore, the Court concluded the issue was appropriate for arbitration because the contract gave no "positive assurance that the arbitration clause was not susceptible to an interpretation that [covered] the asserted dispute."[105] In other words, the Court ruled the dispute should be resolved through arbitration because, although no provision of the contract expressly required arbitration, no language in the contract expressly demonstrated the parties intended that the

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[98] *Id.* at 456. To ensure national uniformity, even state courts hearing disputes related to collective bargaining agreements must abide by this substantive law. *See* Teamsters v. Lucas Flour, 369 U.S. 95, 103 (1962) (requiring states to apply federal common law when hearing actions brought under section 301).

[99] *See* 363 U.S. 574, 574 (1960). The "*Steelworkers* Trilogy" is comprised of *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 593 (1960), *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 564 (1960), and *Warrior & Gulf Navigation*. *See* James B. Zimarowski, *Interpreting Collective Bargaining Agreements: Silence, Ambiguity and NLRA Section 8(d)*, 10 INDUS. REL. L.J. 465, 466 n.2 (1998). The Trilogy confirmed the Court's view that resolving labor disputes through arbitration promotes the goals of federal policy and is "part and parcel of the collective bargaining process." *See Warrior & Gulf Navigation*, 363 U.S. at 578. The Court reaffirmed the Trilogy in *AT&T Tech. v. Communication Workers*, 475 U.S. 643, 648 (1986).

[100] *Warrior & Gulf Navigation*, 363 U.S. at 576–77.

[101] *Id.* at 577.

[102] *Id.*

[103] *Id.* at 578.

[104] *Id.* at 585.

[105] *Warrior & Gulf Navigation*, 363 U.S. at 582–83.

issue not be resolved through arbitration.[106] The Court recognized that because arbitration is a matter of contract, no party could be forced to submit any subject to arbitration unless it agreed to do so.[107] The Court explained, however, that the congressional policy of industrial stabilization could only be fully realized if courts adopted a presumption that any doubts about coverage would be settled in favor of coverage.[108] Unless the collective bargaining agreement specifically stated the dispute was not arbitrable, it would go to arbitration.[109] Thus, the Court established that courts could create a presumption in the face of a contractual ambiguity if such a presumption fulfills national labor policy.[110]

In addition to the NLRA and section 301, the Employee Retirement Income Security Act of 1974 (ERISA)[111] has guided courts deciding welfare benefits litigation.[112] Enacted shortly after *Pittsburgh Plate Glass*, ERISA governs much of the operation of both pension and welfare benefits plans.[113] One of its most important provisions mandates that pension benefits vest in accordance with a detailed procedure.[114] ERISA, however, neither mandates that welfare benefits vest,[115] nor expressly prohibits the vesting of welfare benefits or authorizes unilateral termination of welfare benefits.[116] Instead, ERISA provides only three explicit protections for welfare benefits: 1) plan administrators must act as fiduciaries for retirees; 2) there must be reporting and disclosure of the plan's terms; and 3) retirees have a cause of action in federal court for an employer's breach of duty under the plan.[117] There are few additional specifics on how the benefits are to be protected or under what circumstances retirees may recover.[118] Although proposed legislation would expand protections of

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[106] *See id.* at 583.

[107] *Id.* at 582.

[108] *Id.* at 583.

[109] *See id.*

[110] *See Warrior & Gulf Navigation*, 363 U.S. at 582–83.

[111] 29 U.S.C. § 1001(2000).

[112] *See Skinner Engine*, 188 F.3d at 137–38; *Anderson*, 836 F.2d at 1516.

[113] *See* Fisk, *supra* note 5, at 167.

[114] *See* 29 U.S.C. § 1053(a) (2000).

[115] *See id.* §§ 1051(1), 1081(a)(1) (exempting welfare benefits from vesting requirements).

[116] *See* Brouwer, *supra* note 5, at 988; *see also* Sacher & Pickle, *supra* note 14, at Z-32.

[117] *See* Fisk, *supra* note 5, at 167.

[118] *See id.*

retiree health benefits, Congress has yet to amend ERISA's provisions in this area.[119]

Furthermore, ERISA preempts all state regulation of employee welfare benefit plans.[120] As a result, much stronger protections retirees enjoyed under pre-ERISA state programs were replaced with ERISA's minimal provisions.[121] For example, Hawaii previously mandated that employer-provided health insurance continue after workers retire.[122] Similarly, the Ohio Supreme Court required employee welfare benefits to vest upon creation, while ERISA does not.[123]

B. *The Federal Courts Are Split over Retiree Health Benefits*

Due to the changing realities of the workplace, federal courts began to hear section 301 breach of contract actions in which retirees and their former unions claimed employers breached collective bargaining agreements by terminating vested medical benefits.[124] Despite the framework of federal statutes, and the Supreme Court decisions set out above, neither Congress nor the Supreme Court has expressly explained how federal courts should determine if retiree welfare benefits vested under collective bargaining agreements.[125] When litigants appealed the decisions of federal district courts to the United States appeals courts, each circuit needed to determine how it would resolve the issue within its jurisdiction.[126] All circuits recognize that

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[119] See generally Emergency Retiree Health Benefits Protection Act, H.R. 1322, 107th Cong. (2001). If enacted, this Act would prohibit termination of retiree health benefits even if the employer's health plan reserves a general power to terminate or modify the plan. In March 2001, it was referred to the House of Representatives Committee on Education and the Workforce.

[120] *See* Fisk, *supra* note 5, at 167.

[121] *See id.* at 164.

[122] *Id.*

[123] *See id.* at 230–31.

[124] *See, e.g., Skinner Engine*, 188 F.3d at 136–37; Pabst Brewing Co. v. Corrao, 161 F.3d 434, 437 (7th Cir. 1998); *Grain Millers*, 116 F.3d at 978; *Anderson*, 836 F.2d at 1515; *Yard-Man*, 716 F.2d at 1478. Although most of these suits also involved claims under section 502 of ERISA, this Note primarily focuses on the cases' section 301 claims.

[125] The Supreme Court has ruled that ERISA does not establish any minimum participation, vesting, or funding requirements for welfare plans as it does for pension plans. *See* Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73, 78 (1995). The Court's *Curtiss-Wright* decision, however, sheds little light on what factors courts may consider in determining whether the collective bargaining agreement has vested the benefits because the retirees in that case did not bring a claim under section 301. *See id.* (considering only amendment procedure of section 402(b)(3) of ERISA).

[126] *See, e.g., Skinner Engine*, 188 F.3d at 136–37; *Corrao*, 161 F.3d at 437; *Grain Millers*, 116 F.3d at 978; *Anderson*, 836 F.2d at 1515; *Yard-Man*, 716 F.2d at 1478.

ERISA does not expressly require welfare benefits to vest upon creation.[127] Parties to the agreement can agree to contract around ERISA, however, and draft a contract that vests welfare benefits upon an employee's retirement.[128] Yet, nearly every jurisdiction has developed its own standard to determine when the parties intended retiree health benefits to vest.[129]

The most important issue in welfare benefits termination cases is whether the two parties to the agreement, the employer and the union, mutually intended to provide benefits that lasted beyond the life of the agreement.[130] While courts hearing disputes brought under section 301 are obligated to apply federal common law as shaped by national labor policies set by Congress, they may also apply traditional contract principles to determine the parties' intentions when those principles are not inconsistent with national policy.[131]

If the language of the collective bargaining agreement unambiguously describes the duration of the retirees' medical benefits, courts will abide by the language of the contract and consider that language to be completely indicative of the parties' intent.[132] If, instead, the language is ambiguous as to whether the benefits were intended to vest, courts allow both sides to introduce extrinsic evidence to clarify the parties' intentions at the formation of the agreement.[133] The degree to which a court protects the expectations of the employees and considers the context of the unionized workplace greatly affects both the determination of ambiguity and the ultimate question of what the parties intended.[134]

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[127] *See, e.g.*, Maurer v. Joy Tech. Inc., 212 F.3d 907, 914 (6th Cir. 2000); *Skinner Engine*, 188 F.3d at 137–38; *Corrao*, 161 F.3d at 439; *Masonite*, 122 F.3d at 231.

[128] *See Pittsburgh Plate Glass*, 404 U.S. at 181 n.20.

[129] *See, e.g.*, *Grain Millers*, 116 F.3d at 980 (citing circuits' disagreement over document interpretation and presumptions of vesting).

[130] *See id.*; *see also Skinner Engine*, 188 F.3d at 138–39; *Yard-Man*, 716 F.2d at 1479.

[131] *See, e.g.*, *Warrior & Gulf Navigation*, 363 U.S. at 577–78; *Maurer*, 212 F.3d at 915; *Skinner Engine*, 188 F.3d at 138; *Masonite*, 122 F.3d at 231.

[132] *See Grain Millers*, 116 F.3d at 980; *see also Skinner Engine*, 188 F.3d at 138–39; *Yard-Man*, 716 F.2d at 1479.

[133] *See Grain Millers*, 116 F.3d at 980; *see also Skinner Engine*, 188 F.3d at 138–39; *Yard-Man*, 716 F.2d at 1479.

[134] *Compare* Keffer v. H.K. Porter, Co., 872 F.2d 60, 64 (4th Cir. 1989), *and Yard-Man*, 716 F.2d at 1482–83, *and Roth*, 614 N.W.2d at 472, *with Skinner Engine*, 188 F.3d at 147, *and Anderson*, 836 F.2d at 1517.

1. Courts Considering Employee Expectations

In 1983, in *UAW v. Yard-Man, Inc.*, the United States Court of Appeals for the Sixth Circuit relied in part on employee expectations to find that the parties to the collective bargaining agreement intended retiree welfare benefits to vest.[135] Although one of the earliest benefits-termination cases, *Yard-Man* has remained the leading case for claims that the parties intended retiree welfare benefits to vest.[136] In *Yard-Man*, an employer notified retirees in April 1977 that it intended to terminate their insurance benefits when the collective bargaining agreement expired two months later, on June 1, 1977.[137] At trial, the employer stated that the contract's terms clearly and unambiguously limited the benefits to the life of the agreement.[138] The contract stated: "When the former employee has attained the age of 65 years, then: (1) The Company will provide insurance benefits equal to the active group benefits ... for the former employee and his spouse."[139] The union maintained this language was evidence of an intent to provide lifetime retiree medical benefits.[140] The district court ruled for the union and the retirees and the Sixth Circuit affirmed.[141]

The *Yard-Man* court began its decision by finding that the agreement was ambiguous as to the benefits' duration.[142] It considered the agreement's language and found two competing interpretations equally reasonable.[143] One could read the phrase "will provide insurance benefits equal to the active group" as a mere characterization of the nature of the benefits, as the union suggested.[144] The phrase could also be read to incorporate a durational limit to the benefits and mean that once active benefits are terminated due to a plant closing or the expiration of the agreement, retiree benefits are likewise

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[135] *See Yard-Man*, 716 F.2d at 1482.

[136] *See Maurer*, 212 F.3d at 914–15; *Bidlack*, 993 F.2d at 613 (Cudahy, J., concurring); *Keffer*, 872 F.2d at 64; *Roth*, 614 N.W.2d at 472.

[137] *Yard-Man*, 716 F.2d at 1478.

[138] *Id.* at 1480.

[139] *See id.*

[140] *See id.*

[141] *See id.* at 1478.

[142] *See Yard-Man*, 716 F.2d at 1480.

[143] *See id.*

[144] *Id.*

terminated.[145] Due to this ambiguity, the court turned to extrinsic evidence to determine the intent of the parties.[146]

The court considered several other clauses of the agreement and largely determined the intent of the parties based on the contract's specific language.[147] In addition to considering the contract's language, however, the court looked to a final factor to arrive at the decision's most noteworthy and controversial element.[148] It inferred from the context of the bargaining situation that the parties intended benefits to vest.[149] The court based this inference, now known as the "*Yard-Man* Inference," on what it perceived to be conditions in the employment relationship that create employee expectations of continued benefits.[150]

First, the *Yard-Man* court noted that retirees had an expectation of future benefits because retirement welfare benefits are "typically understood as a form of delayed compensation or reward for past services."[151] Retirees, therefore, earned these benefits because they had previously sacrificed wages for an anticipated payment of retirement benefits in the future.[152] The retirees presumably knew, however, that the union had no duty to represent them and, therefore, could negotiate those benefits away in future collective bargaining.[153] The court found it unlikely for retirees to leave unprotected and subject to bargaining in which they would not be represented the benefits that they had made previous sacrifices to gain.[154] The court thus observed that retirees would expect their retirement medical benefits to be guaranteed, regardless of the bargain reached in subsequent agreements.[155] Because the court believed the parties negotiating the agreement knew such expectations would arise in response to this delayed compensation, it inferred that the benefits' inclusion in the contract indicated the parties intended the benefits to vest.[156]

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[145] *Id.*

[146] *Id.*

[147] *See Yard-Man*, 716 F.2d at 1481–82 (finding employer's past payment of benefits despite expiration of collective bargaining agreement, lack of specific limitation on welfare benefits, and other contract language indicated intent to vest benefits).

[148] *See id.* at 1482.

[149] *See id.*

[150] *See id.*

[151] *Id.*

[152] *Yard-Man*, 716 F.2d at 1482.

[153] *Id.* (citing *Pittsburgh Plate Glass*, 404 U.S. at 181–82).

[154] *Id.*

[155] *Id.*

[156] *See id.*

Second, the court labeled retiree welfare benefits "status" benefits that create an expectation among employees that the benefits would continue as long as the person maintained such a status.[157] Because the parties agreed to provide benefits of this nature, the court decided it was logical to infer that the parties intended to agree to vested benefits.[158] The rationale was that the parties must have realized what expectations such benefits would create and that they had considered the implications of such a choice.[159] The *Yard-Man* court decided that the employer was obligated to fulfill the expectations the agreement had created.[160] Again, the inclusion of the benefits in the collective bargaining agreement became grounds to infer that the benefits were intended to vest.[161] The Sixth Circuit continues to apply the "*Yard-Man* Inference" in cases where former union employees claim an ambiguous collective bargaining agreement granted them vested rights.[162]

Judges outside the Sixth Circuit have relied on the expectations of employees to justify a presumption[163] that vests retiree welfare benefits upon retirement and requires employers to prove that benefits were not intended to continue for life.[164] While the opinions have limited precedential value, each presents arguments for such a presumption.[165] The first of these opinions comes from a concurrence by Judge Richard Cudahy in *Bidlack v. Wheelabrator Corp.*, a 1993 decision from the United States Court of Appeals for the Seventh Circuit.[166] The concurrence argued that, absent an unambiguous contract stating the benefits' duration, courts should apply a rebuttable presumption that benefits vested upon retirement.[167] In *Bidlack*, employees who had retired before 1986 sued their employer after it discontinued retiree medical benefits that were conferred in a collective

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[157] *Yard-Man*, 716 F.2d at 1482.

[158] *Id.*

[159] *Id.* at 1482–83.

[160] *See id.* at 1482.

[161] *Id.*

[162] *See Maurer*, 212 F.3d at 914–15; UAW v. BVR Liquidating, Inc., 190 F.3d 768, 773 (6th Cir. 1999); Golden v. Kelsey-Hayes Co., 73 F.3d 648, 656 (6th Cir. 1996).

[163] The difference, if any, between a presumption and an inference will be discussed below. *See infra* notes 371–386 and accompanying text. For the purpose of this section, it is enough to consider them both as rules based on expectations that aid retirees in proving that benefits were vested.

[164] *See Bidlack*, 993 F.2d at 613 (Cudahy, J., concurring); *Roth*, 614 N.W.2d at 473.

[165] *See infra* notes 166–197 and accompanying text.

[166] *See* 993 F.2d at 613 (Cudahy, J., concurring).

[167] *See id.* (Cudahy, J., concurring).

bargaining agreement.[168] The lead opinion in *Bidlack*, written by Judge Richard Posner, found that because the plaintiffs could show the contract was ambiguous regarding medical benefits, they could have a trial on the agreement's meaning.[169] There, the retirees could present extrinsic evidence to clarify whether the parties intended the benefits to be interminable.[170] On remand, however, the retirees would still bear the burden of proof and the trial court could not apply a presumption that the benefits had vested.[171]

Judge Cudahy and two concurring judges agreed with the lead opinion's position that the appropriate standard for the court was a weak presumption, rebuttable with extrinsic evidence in the event of an ambiguity.[172] They favored this approach because, if applied prospectively, future parties could bargain easily around the rule if they chose.[173] If applied retrospectively to parties already in court, it would allow them to present extrinsic evidence of actual intent when necessary.[174] A weak rule, as the concurrence labels a rebuttable presumption, was preferable to a strong rule that allowed introduction of extrinsic evidence only after the plaintiff could show express language indicating an intent to vest.[175]

The concurrence differs, however, from the lead opinion in its conclusion over what the weak presumption should be.[176] While the lead opinion applied a presumption against vesting, Cudahy's view of the social reality that the parties shared at the formation of the contracts convinced him to favor a presumption for vesting.[177] He perceived the prevailing conditions at the formation of the contracts to

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[168] *See id.* at 604, 605–06.

[169] *See id.* at 608–09 (stating language "both you and your spouse will be covered for the remainder of your lives" at no cost could reasonably be either promise to vest benefits or mere description of benefits during contract's three-year term). Reflecting the federal courts' widespread disagreement over the vesting of medical benefits, there was no majority opinion in the Seventh Circuit's decision in *Bidlack*. Judge Posner gained two additional votes for the lead opinion, two other judges joined Judge Cudahy's concurrence, and the four remaining judges dissented in an opinion written by Judge Easterbrook. *See* Isler & Snyderman, *supra* note 18, at 32.

[170] *See Bidlack*, 993 F.2d at 609.

[171] *See id.* at 611 (Cudahy, J., concurring) (wording used to characterize lead's approach); *see also infra* notes 256–257.

[172] *See Bidlack*, 993 F.2d at 613 (Cudahy, J., concurring).

[173] *See id.* (Cudahy, J., concurring).

[174] *See id.* (Cudahy, J., concurring).

[175] *See id.* (Cudahy, J., concurring).

[176] *See id.* (Cudahy, J., concurring).

[177] *See Bidlack*, 993 F.2d at 613 (Cudahy, J., concurring).

suggest that both the union and management intended retiree health benefits to vest unless there was an agreement to the contrary:

> Before about 1980, I seriously doubt that it occurred to many employers to grant retiree health benefits on anything less than a lifetime basis. The overwhelmingly prevalent trend of labor contracts was to continue or improve retiree benefits from contract to contract. . . . I think that, at least before the eighties were in full swing, prevailing conditions suggested a presumption among unions and management alike that retiree health benefits vested unless there was agreement to the contrary.[178]

Additionally, Cudahy recognized that in some cases, the silence of two parties in a contract speaks more than the words.[179] There are certain expectations that are so fundamental, they need not be negotiated.[180] In this instance, the expectations of continued benefits were such that, according to Cudahy, they were never in question.[181] Under this view, the context of the bargaining relationship makes a presumption of vesting reasonable at least for those who retired prior to the mid-1980s.[182]

In *Roth v. City of Glendale*, a 2000 case similar to those brought in federal court, the Wisconsin Supreme Court expressly opted to follow the reasoning of the *Bidlack* concurrence and adopted a rebuttable presumption that the benefits vested.[183] In *Roth*, retirees sued the city for breach of contract in state court after the city modified benefits gained in a series of collective bargaining agreements between 1972 and 1996.[184] A lower court held there was no intention for the benefits to vest because the agreements were of limited duration and were renegotiated every two years.[185] Also, the agreements after 1989 provided progressively less generous benefits and allowed the city greater flexibility in modifying future benefits.[186] After reviewing the differing opinions in *Bidlack*, the Wisconsin Supreme Court reversed

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[178] *See id.* (Cudahy, J., concurring).

[179] *See id.* at 612 n.1 (Cudahy, J., concurring) (citing ARTHUR CORBIN, CORBIN ON CONTRACTS § 570 (Colin K. Kaufman ed., Supp. 1984)).

[180] *See id.* (Cudahy, J., concurring).

[181] *See id.* (Cudahy, J., concurring).

[182] *Bidlack*, 993 F.2d at 613 (Cudahy, J., concurring).

[183] *See Roth*, 614 N.W.2d at 472.

[184] *Id.* at 468–69.

[185] *Id.* at 470.

[186] *Id.*

the lower court's ruling and remanded the case for further consideration.[187] Because the retirees' suit was in state court and the claim did not arise under section 301, the Supreme Court was not obligated to rely upon the decisions of the Seventh Circuit.[188] The *Roth* court, however, adopted Cudahy's reasoning because the presumption he advocated better "comport[ed] with 'a more far-reaching understanding of the context in which retiree benefits arise.'"[189] The presumption was further appropriate because it fulfills the "legitimate expectations of employees who have bargained for these benefits."[190]

The *Roth* court found these expectations legitimate for several reasons, including those suggested in *Yard-Man*.[191] The *Roth* court cited additional factors to support its finding that retiree welfare benefits should presumptively vest, however.[192] Because benefits were a recruiting tool employers used to attract and maintain workers, employers who offered retiree benefits gained the reciprocal benefit of employee retention.[193] The court reasoned that employers who offer their employees these benefits as an inducement cannot withdraw them after the retirees have performed their services for the employer but before the retirees receive their reward.[194] "[Once] an employee has complied with all the conditions entitling him to retirement rights thereunder" the employer cannot unilaterally revoke the benefits.[195] Where the contract does not expressly indicate the benefits were for a fixed term, the court would not allow employers to

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[187] *See id.* at 468. The Wisconsin Supreme Court also noted that the lower court based its ruling on a 1992 decision by the Seventh Circuit, *Senn v. United Dominion Industries*, 951 F.2d 806, 806 (7th Cir. 1992). *See id.* Under *Senn*, plaintiffs needed to show clear, express language to overcome the presumption that benefits terminated at the expiration of the agreement. *See* 951 F.2d at 815–16. Because the court of appeals found no such language in the agreements, it ruled in the city's favor. *See Roth*, 614 N.W.2d at 470. *Bidlack*, however, made the continued viability of *Senn* highly questionable. *See* 993 F.2d at 610. When *Roth* reached the Wisconsin Supreme Court, the court further questioned the lower court's 1999 opinion because it failed to consider *Senn* in light of *Bidlack*. *See* 614 N.W.2d at 471.

[188] *See Lucas Flour*, 369 U.S. at 103.

[189] *See Roth*, 614 N.W.2d at 472 (quoting *Keffer*, 872 F.2d at 64).

[190] *See id.*

[191] *See id.* at 472–73 (agreeing with *Yard-Man* that retiree benefits are status benefits earned through prior service and holding that because retirees are not represented in future bargaining, deferred compensation could be lost if not presumed to vest).

[192] *See id.* at 472.

[193] *See Roth*, 614 N.W.2d at 472 (citing Lovett v. Mt. Senario College, Inc., 454 N.W.2d 356 (Wis. Ct. App. 1990)).

[194] *Id.*

[195] *See id.* (quoting Schlosser v. Allis-Chalmers Corp., 271 N.W.2d 789, 889 (Wis. 1978)).

modify their obligations because to do so would render the promise of retiree benefits illusory and defy the equitable principles underlying the employer-employee relationship.[196] Based on these observations, the *Roth* court considered the expectations valuable and legitimate enough to protect, and required the employer to prove through extrinsic evidence that they were incorrect or unfounded.[197]

Few other courts outside the Sixth Circuit have given unqualified support to *Yard-Man*'s holding that employee expectations of continued benefits justify an inference that the parties to the agreement intended benefits to vest, but it is frequently stated that other circuits have accepted the "*Yard-Man* Inference."[198] It has been accepted outright in decisions by the United States Courts of Appeals for the Fourth[199] and Eleventh Circuits.[200] Like the *Yard-Man* court, however, both of these courts only relied on the inference to buttress an already sufficient finding that other language in the contract established a mutual intent to vest retiree health benefits.[201]

Numerous authorities report that in 1987, the United States Court of Appeals for the First Circuit in *United Steelworkers v. Textron, Inc.* adopted the "*Yard-Man* Inference."[202] The extent to which it actually accepted the Sixth Circuit's reasoning is debatable, however.[203] In 1987, the United States District Court for the District of Massachusetts granted a preliminary injunction requiring Textron to continue to provide retirees insurance coverage until the court could determine

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[196] *See id.* at 473.

[197] *See id.* The concurrence in *Roth* would have followed the lead opinion in *Bidlack.* The concurring justices stated that while the majority's preference for a vesting presumption was a policy preference they shared, they were constrained by the law of contracts to oppose it. Such a burden-shifting presumption, the concurrence insisted, could not be imposed upon parties who had a written collective bargaining agreement with a limited term. Unlike the *Roth* majority, the concurrence viewed the expectations created by the benefits as too weak to justify forcing the employer to prove it did not agree to lifetime benefits, or that the expectations were unreasonable. *See id.* at 476 (Sykes, J., concurring).

[198] *See Bidlack*, 993 F.2d at 613 (Cudahy, J., concurring); Berneking, *supra* note 5, at 276; Sacher & Pickle, *supra* note 14, at Z-34.

[199] *See Keffer*, 872 F.2d at 64 (stating inclusion of retiree welfare benefits in collective bargaining agreement created expectations of continued benefits and that recognizing those expectations comports "with a more far-reaching understanding of the context in which retiree benefits arise").

[200] *See* United Steelworkers v. Connors Steel Co., 855 F.2d 1499, 1505 (11th Cir. 1988) (stating court fully concurred with ruling of Sixth Circuit in *Yard-Man*).

[201] *See Keffer*, 872 F.2d at 63; *Connors Steel*, 855 F.2d at 1505.

[202] *See Skinner Engine*, 188 F.3d at 140; *see also* Berneking, *supra* note 5, at 274.

[203] *See In re* Morse Tool, 148 B.R. 97, 145 (Bnkr. D. Mass. 1992).

whether Textron had promised to provide lifetime benefits.[204] While never mentioning *Yard-Man* specifically, the district court observed that it was "logical to infer that benefits accorded to a retiree continue so long as that person remains a retiree."[205] When the First Circuit affirmed the district court's ruling, it found language in the collective bargaining agreement that was similar to the language in *Yard-Man* to be "consistent with a . . . promise to pay retirees' insurance costs throughout their retirements."[206] The First Circuit, however, never expressly endorsed or even addressed the *Yard-Man* holding that the existence of retiree medical benefits created an inference that the benefits were intended to vest.[207] The experience of the First, Fourth and Eleventh Circuits shows that while other courts have endorsed some principles of *Yard-Man* and considered employee expectations in their analysis, none have applied them as consistently as the Sixth Circuit or as broadly as Judge Cudahy did in his concurrence.[208]

2. Courts Not Giving Weight to Employee Expectations

The United States Courts of Appeals for the Third, Seventh and Eighth Circuits have rejected the rationale of *Yard-Man* and its progeny and have concluded that it is inappropriate for courts to aid plaintiffs by considering employee expectations in benefits termination litigation.[209] While expressing sympathy for the retirees and recognizing that they are disappointing workers' expectations, these courts consider themselves constrained by the law of contracts and labor policy to find employers had the right to unilaterally modify benefits.[210]

For example, in 1988 in *Anderson v. Alpha Portland Industries*, the Eighth Circuit became one of the first courts to expressly reject the

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[204] *See* United Steelworkers v. Textron, Inc., No. CIV.A.85–4950-MC, 1987 WL 33023, at *2 (D. Mass., Feb. 2, 1987).

[205] *See id.*

[206] *Textron*, 836 F.2d at 9. The decision stated that the plaintiffs had made a sufficient showing to demonstrate a likelihood of success on the merits, however, at that stage of the proceedings, the court did not need to weigh the conflicting arguments. *Id.*

[207] *See Morse Tool*, 148 B.R. at 145. The First Circuit also failed to mention whether it was logical for benefits to continue as long as a person remains retired. *Textron*, 836 F.2d at 9. The district court never reached a decision on the merits of the case after this preliminary injunction was affirmed. *See* Melbinger & Culver, *supra* note 39, at 152.

[208] *See Keffer*, 872 F.2d at 64; *Connors Steel*, 855 F.2d at 1505; *Textron*, 836 F.2d at 9.

[209] *See Skinner*, 188 F.3d at 140; *Bidlack*, 993 F.2d at 608; *Anderson*, 836 F.2d at 1517.

[210] *See Skinner*, 188 F.3d at 147 (citing *Corrao*, 161 F.3d at 442).

Sixth Circuit's *Yard-Man* approach.[211] In *Anderson*, retirees sued to maintain their insurance benefits after their former employer canceled the benefits at the expiration of the collective bargaining agreement.[212] Relying on *Yard-Man*, they argued that the court should presume the benefits were intended to vest and require the employer to prove the benefits were for a limited duration.[213] The Eighth Circuit rejected the invitation to apply a *Yard-Man* approach and affirmed the lower court's ruling that the benefits were not vested.[214] First, the court stated that even if it did agree with the Sixth Circuit in *Yard-Man*, it would not shift the burden of persuasion to the defendants.[215] Second, the court rejected *Yard-Man* to the extent that it created an inference that benefits are intended to vest.[216] The *Anderson* court noted that ERISA exempted welfare benefits from its vesting requirements and Congress had expressed no other labor policy that would presumptively favor vesting.[217] Because Congress had taken a "neutral position on this issue . . . [the court found] it is not at all inconsistent with labor policy to require plaintiffs to prove their case without the aid of gratuitous inferences."[218] The court considered the contract ambiguous and allowed extrinsic evidence to clarify the language's meaning, but the retirees could not rely on an inference based on employee expectations of continued benefits to show the parties to the contract intended benefits to vest.[219]

As mentioned above, in Judge Posner's lead opinion in *Bidlack*, the Seventh Circuit concluded that employee expectations of continued benefits do not justify a presumption or inference that the benefits were vested.[220] The court realized that employers who provided lifetime benefits to retirees "not anticipating the recent rise in health costs . . . should not expect the courts to bail them out . . . of their improvident [contractual] commitments."[221] More importantly, however, Posner sought to protect the "limitation of liabilities that is

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[211] *Anderson*, 836 F.2d at 1517.

[212] *Id.* at 1515.

[213] *Id.*

[214] *Id.*

[215] *See id.* at 1517 (noting Sixth Circuit insisted it created an inference in *Yard-Man*, not a presumption, and "[i]nferences do not shift the burden").

[216] *See Anderson*, 836 F.2d at 1517.

[217] *See id.*

[218] *Id.*

[219] *See id.*

[220] *See Bidlack*, 993 F.2d at 609.

[221] *See id.*

implicit in the negotiation of a written contract having a definite expiration date."[222] A presumption based on factors outside the language of the collective bargaining agreement would "deprive the parties of the protection of a written document."[223]

Instead of a presumption or inference based on employee expectations, Posner applied a weak "no-vest" rule, which presumed that a contract silent about the duration of retiree welfare benefits does not vest the benefits.[224] The retirees could rebut this presumption, and did so in *Bidlack*, if they demonstrated that the contract was ambiguous.[225] If the retirees demonstrated a "yawning void . . . that cries out for an implied term," extrinsic evidence could be produced at a trial to prove what the parties intended in the ambiguous contract.[226] The retirees, however, would still bear the burden of persuasion to prove that the parties intended the benefits to vest.[227] Cases decided in the Seventh Circuit since *Bidlack* continue to adhere to the lead opinion's reasoning and have developed this weak "no-vest" presumption.[228]

In 1999, in *UAW v. Skinner Engine Co.*, the Third Circuit issued the most recent rejection of the *Yard-Man* approach.[229] Like *Yard-Man*, *Skinner Engine* presented a dispute between an employer and union that had negotiated a series of collective bargaining agreements offering retirees benefits and promising that the employer "will continue to provide" several types of medical coverage.[230] As with other companies who were forced to recognize huge retiree healthcare liabilities due to FAS 106, Skinner Engine significantly reduced its retirees' welfare benefits, including those for workers who were already retired.[231] The union and similarly-situated retirees sued the employer, claiming that these changes could apply only to future retirees and constituted

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[222] *See id.* at 608.

[223] *See id.*

[224] *See id.*

[225] *See Bidlack*, 993 F.2d at 608.

[226] *See id.*

[227] *See id.*

[228] *See* Rossetto v. Pabst Brewing Co., 217 F.3d 539, 545 (7th Cir. 2000), *cert. denied* 121 S. Ct. 1191 (2001) (finding retirees demonstrated latent ambiguity that rebutted presumption that benefits do continue beyond expiration of contract); *Corrao*, 161 F.3d at 442 (finding no ambiguity in contract that allowed extrinsic evidence to be produced and finding employer had right to terminate benefits).

[229] *See* 188 F.3d at 139.

[230] *Id.* at 135.

[231] *Id.* at 136 (describing changes as elimination of retiree life insurance, elimination of spousal coverage, requirement of co-payments and increase in deductibles).

a breach of contract under section 301.[232] The court rejected the union's claim, however, and affirmed the lower court's decision that the contract did not grant the retirees vested benefits.[233]

Central to the Third Circuit's holding in *Skinner Engine* was its rejection of the "*Yard-Man* Inference" as an aid to plaintiffs.[234] First, the court agreed with the Eighth Circuit's ruling in *Anderson* that it was not at all inconsistent with federal labor policy for the court to require plaintiffs to prove that benefits had vested without the use of gratuitous inferences.[235] Because Congress had not expressly required benefits to vest, the court found it illogical that expectations of continued benefits created by the status nature of benefits should be grounds to find benefits had become vested as a general rule.[236] It further stated that since Congress chose to omit welfare benefits from ERISA's vesting requirements, a presumption or inference that such benefit may vest would be contrary to Congress's intent.[237]

Secondly, the Third Circuit criticized the *Yard-Man* court's holding that courts should protect retirees expectations of continued benefits because the union was not obligated to represent retirees.[238] Drawing on Posner's opinion in *Bidlack*, the court noted that when the collective bargaining agreements at issue were formed, the retirees were active members of the union that negotiated the agreements.[239] Thus, the court held that the retirees should have taken steps to encourage the union to include language in the collective bargaining agreements protecting those benefits.[240] If the court determines, as the court did in *Skinner Engine*, that the contract neither unambiguously vests retiree medical benefits nor ambiguously suggests them, the retirees have only themselves to blame for not pressing their union to include such language.[241] In *Skinner Engine*, the court only considered the express language of the contract and, without the benefit of an inference, the plaintiffs failed to prove that the

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[232] *Id.* at 136–37. The union's breach of ERISA fiduciary duty and equitable estoppel claims were also unsuccessful. *See id.* at 151–52.

[233] *See Skinner*, 188 F.3d at 140–41.

[234] *See id.* at 141.

[235] *Id.* at 140–41.

[236] *Id.* at 140.

[237] *Id.* at 141.

[238] *Skinner*, 188 F.3d at 141.

[239] *Id.*

[240] *Id.*

[241] *Id.*

parties to the collective bargaining agreement intended for benefits to vest.[242]

Even circuits that have not explicitly rejected *Yard-Man* have been unwilling to look to employee expectations of continued benefits to determine whether the parties intended benefits to vest.[243] Shortly after the Eighth Circuit rejected *Yard-Man* in *Anderson*, the Fifth Circuit in 1990 in *United Paperworkers International Union v. Champion International Corp.* also criticized *Yard-Man*.[244] While conceding that the retirees' lack of a voice could be considered as a factor on a contract-by-contract basis, the *United Paperworkers* court rejected an approach where such factors would apply as a general rule of law.[245] Similarly, in *American Federation of Grain Millers v. International Multi-Foods Corp.*, the Second Circuit declined to express an opinion as to whether there should be a presumption or inference of vesting if the collective bargaining agreement is ambiguous.[246]

The difference between the courts is clear. Some view retiree expectations as sufficient to create an inference, or even a presumption, that the benefits were intended to vest.[247] Others do not allow extra-contractual factors like expectations to aid retirees' attempts to prove the contract provided lifetime benefits.[248] Where expectations are considered, the outcome is almost always favorable to the employee, making the employer responsible for providing interminable and potentially expensive benefits.[249] Given the potential for employee expectations to determine the outcome of these cases, it is important for courts to determine what role, if any, these expectations and the bargaining context that fosters them should have in benefits-termination litigation.[250]

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[242] *Id.* at 141–42 (finding language of contract neither unambiguously vested benefits nor ambiguously suggested they were vested).

[243] *See Grain Millers*, 116 F.3d at 980; United Paperworkers Int'l Union v. Champion Int'l Corp., 908 F.2d 1252, 1261 (5th Cir. 1990).

[244] *See* 908 F.2d at 1261.

[245] *See id. But see Masonite*, 122 F.3d at 231 (stating in 1997 decision that *United Paperworkers* merely "questioned" *Yard-Man*).

[246] *See* 116 F.3d at 980.

[247] *See supra* notes 124–208 and accompanying text.

[248] *See supra* notes 209–246 and accompanying text.

[249] *See supra* notes 124–208 and accompanying text.

[250] *See infra* notes 251–416 and accompanying text.

III. Expectations as an Appropriate Basis for Vesting

As the cases in Part II illustrate, there is a split between the circuits over how much protection courts should afford to retirees' expectations of continued benefits.[251] Much of the disagreement occurs because, with an expectation approach to welfare benefits litigation, courts determine the contractual obligations of employers using factors from outside the collective bargaining agreement that provided the benefits.[252] Many critics of this approach consider the expectations of retirees to be an insufficient basis for requiring employers to provide lifetime benefits.[253] This section addresses the arguments for and against the legitimacy of expectations in these cases.[254]

A. *Historical Elements of the Workplace that Fostered Reasonable Expectations*

Courts following the *Yard-Man* approach all justify a finding that retiree health benefits were vested by looking to the nature of the unionized workplace and the collective bargaining context.[255] Supporters of this approach argue that the expectations of lifetime benefits should be protected because they are reasonable given the workplace and the relationship in which they arose.[256] One of the main criticisms of the *Yard-Man* approach has been that these factors are an insufficient basis upon which to find that benefits vested.[257] These critics suggest that while retirees may have subjectively expected benefits, the expectations are unreasonable based upon the situation and employers should not be required to provide expensive and lifetime benefits based on them.[258] For example, in *Skinner Engine*, the Third Circuit said that the intent to provide lifetime benefits will not be inferred lightly and required the retirees to present clear evidence from the

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[251] *See supra* notes 124–250 and accompanying text.

[252] *Compare* Keffer v. H.K. Porter Co., 872 F.2d 60, 64 (4th Cir. 1989), *and* UAW v. Yard-Man, Inc., 716 F.2d 1476, 1482 (6th Cir. 1983), *and* Roth v. City of Glendale, 614 N.W.2d 467, 472 (Wis. 2000), *with* UAW v. Skinner Engine Co., 188 F.3d 130, 141 (3d Cir. 1999), *and* Anderson v. Alpha Portland Indus., Inc., 836 F.2d 1512, 1517 (8th Cir. 1988).

[253] *See Skinner Engine*, 188 F.3d at 140–41; *Anderson*, 836 F.2d at 1517; Weckstein, *supra* note 11, at 127; Rogers, *supra* note 11, at 1059.

[254] *See infra* notes 255–370.

[255] *See Yard-Man*, 716 F.2d at 1482; *see also Keffer*, 872 F.2d at 64; *Roth*, 614 N.W.2d at 472.

[256] *See, e.g.*, Bidlack v. Wheelabrator Corp., 993 F.2d at 603, 613 (7th Cir. 1993) (Cudahy, J., concurring); *Yard-Man*, 716 F.2d at 1482.

[257] *See Skinner Engine*, 188 F.3d at 140–41; *Anderson*, 836 F.2d at 1517.

[258] *See Skinner Engine*, 188 F.3d at 140–41; *Anderson*, 836 F.2d at 1517; Weckstein, *supra* note 11, at 130–33; Rogers, *supra* note 11, at 1059–60.

contract that benefits vested.[259] It refused to bind the employer based on extra-contractual factors of the employment relationship, such as elements of the workplace that would encourage expectations of continued benefits.[260] Because courts like the Third Circuit do not aid plaintiffs by considering employee expectations, they do not require an employer to prove that the expectations were incorrect as Judge Cudahy or the *Roth* court would.[261]

Courts looking to employee expectations point to several elements of the unionized workplace to demonstrate worker expectations of lifetime benefits are reasonable.[262] Judge Cudahy's *Bidlack* concurrence argued that, until recently, retiree health benefits were fundamental to the unionized workplace and that courts should presume that benefits were to vest based on the prevailing trend of constant improvement or continuation of benefits that characterized the union relationship.[263] Although the contracts granting such benefits were limited in duration, the benefits were almost automatically renewed.[264] While retiree health benefits have now become scarce, they were not seriously threatened until the mid- to late-1980s and it was not until FAS 106 was instituted in 1993 that widespread termination of retiree welfare benefits really began.[265]

Also, in *Roth*, the Wisconsin Supreme Court noted that employers used welfare benefits as tools for recruitment and retention as grounds in part for a presumption that the benefits vested.[266] Because these benefits allowed employers to retain workers and enjoy lower costs, the court considered it unfair to allow employers to reduce these benefits after the employees had retired.[267] If courts fail to protect these expectations, employers enjoy the benefits of low worker

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[259] *See Skinner Engine*, 188 F.3d at 141.

[260] *See id.*

[261] *Compare Skinner Engine*, 188 F.3d at 141 (refusing to shift burden to employer), *with Bidlack*, 993 F.2d at 613 (Cudahy, J., concurring) (arguing that court should require employer to demonstrate that expectations were incorrect), *and Roth*, 614 N.W.2d at 472 (adopting Cudahy's *Bidlack* position).

[262] *See Bidlack*, 993 F.2d at 613 (Cudahy, J., concurring); *Roth*, 614 N.W.2d at 472.

[263] *See Bidlack*, 993 F.2d at 612-13 (Cudahy, J., concurring).

[264] *See* Leslie Pickering Francis, *Consumer Expectations and Access to Healthcare*, 140 U. PA. L. REV. 1881, 1888 (1992).

[265] *See supra* notes 51–57 and accompanying text; *see also* BUREAU OF NAT'L AFFAIRS, BASIC PATTERNS IN UNION CONTRACTS 14 (14th ed. 1995) [hereinafter BASIC PATTERNS, 14th ed.] (finding, in survey of contracts after 1992, over half of contracts still provide for retiree life insurance).

[266] *See Roth*, 614 N.W.2d at 472.

[267] *Id.*

mobility but need not fulfill workers' expectation that they would receive future benefits.[268] Empirical data strengthens the *Roth* court's conclusion that employers use retiree and health benefits as recruiting tools and gain the benefits of lower worker mobility and higher retention.[269] A survey of workers in 2000 by BLS economists also found that employees in all age groups were significantly less likely to have searched for a new job when their employer provided health and retirement benefits.[270] Additionally, employees were more likely to work for employers who offer such benefits.[271]

B. *Continued Benefits as a Workplace Social Norm*

Critics of the *Yard-Man* approach might argue that even if the benefits were historically common in the workplace, today's retirees should not have expected to receive lifetime benefits because, as the data in Part I indicates, the trend Judge Cudahy points to began to change after the mid-1980s and ended completely once FAS 106 was instituted.[272] The characteristics of the workplace that may have given rise to such expectations in the past are no longer common.[273] Thus, the trend of decreasingly generous benefits should have signaled to workers that the terms of the work relationship had changed, making retirees unable to claim that their expectations of vested employer-provided health benefits are reasonable.[274] Because it would be inappropriate to require employers to pay for expensive benefits based on these phantom expectations, critics argue, they should not be a determining factor in today's litigation.[275]

A careful understanding of the workplace and worker expectations is necessary, however, before an expectation of continued benefits is dismissed as a relic of a by-gone era.[276] Research by Profes-

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[268] *Id.*

[269] *See* Thomas C. Buchmueller & Robert G. Valletta, *The Effects of Employer-Provided Health Insurance on Worker Mobility*, 49 INDUS. LAB. REL. REV. 439, 453–54 (1996) (finding employer-provided health benefits decreased worker mobility).

[270] *See* Joseph R. Meisenheimer II & Randy Ilg, *Looking for a "Better" Job: Job-Search Activity of the Employed*, MONTHLY LAB. REV., Sept. 2000, at 7.

[271] *See id.*

[272] *See supra* notes 51–57 and accompanying text (finding availability of benefits decreased and number of plans requiring co-payments increased in 1990s).

[273] *See supra* notes 51–57 and accompanying text.

[274] *See* Weckstein, *supra* note 11, at 130–33; Rogers, *supra* note 11, at 1059–60.

[275] *See* Weckstein, *supra* note 11, at 130–33; Rogers, *supra* note 11, at 1059–60.

[276] *See* Pauline T. Kim, *Norms, Learning and the Law: Exploring The Influences on Workers Legal Knowledge*, 1999 U. ILL. L. REV. 447, 480–95 (1999).

sor Pauline Kim suggests that workers' understandings of their employers' legal obligations are quite resilient and not easily swayed by changed circumstances.[277] Her research in another area of the employment relationship may point to a common phenomenon among employees, which would explain why even after years of reductions in welfare benefits, they would continue to expect lifetime benefits.[278] In a survey of workers in three states, Professor Kim found significant numbers of workers incorrectly believed the law prevented discharges without cause where the employer was free to discharge under the employment at will doctrine.[279] Only a fraction of workers realized how few restrictions the law places on employers' ability to terminate employees.[280] Even more surprising was that even in the face of clear disclaimers stating employers could discharge for any reason, most of those surveyed still believed the law prevented a discharge.[281] Moreover, personal experiences such as previous termination or past union membership had no significant effect on the workers' understanding of employer obligations.[282] Contrary to the assertions of the defenders of employment at will, employees continue to overestimate the protections the law affords them despite seeing those around them lose their jobs without cause.[283]

Professor Kim explains these puzzling results by concluding that workers confuse the norms of the internal labor market (ILM) with formal legal rules, leading them to have high expectations of employers' duties even though the law does not hold employers to these

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[277] *See id.* at 476.

[278] *See id.* at 493–94 (considering whether results of this study might apply to other areas of employment relationship).

[279] *Id.* at 466. Under common law, courts presume, as a general rule, in the absence of an agreement to the contrary, employment is at the will of either the employer or the employee and either party is free to end the relationship at any time, with or without cause. *See id.* at 449.

[280] *See* Kim, *supra* note 276, at 466. Fewer than 10% of respondents correctly understood that they have only minimal legal protections in various discharge situations. *See id.* at 466.

[281] For example, after reading a disclaimer stating "Company reserves the right to discharge employees at any time, for any reason, with or without cause," approximately three-fourths of those who previously thought a lawful discharge was unlawful continued to think so. *Id.* at 465.

[282] *Id.* at 476. Additionally, age and a worker's responsibility for hiring and firing did not significantly influence the worker's understanding of the law. The only demographic variable to significantly affect the employee's understanding of the law was education and income level, but the effect of this variable was inconsistent. *See id.*

[283] *See* Kim, *supra* note 276, at 451 (citing employment at will defenders Richard Epstein and J. Hoult Vererke).

same standards.[284] The ILM is the "network of arrangements, understandings and agreements that constitute the employment relationship" within a single firm or workplace.[285] These arrangements and understandings can become norms that bind employers even though they are under no legal obligation because employers seek to avoid the informal sanctions that result from breaching such norms, like a negative reputation for mistreating employees, discontented workers that are less productive, and low morale among the employees.[286] By confusing the norm and the formal legal rule, workers in the study believed that the employer was bound to discharge only for cause while state employment law did not require for-cause terminations.[287] This confusion occurs because the norm of no discharge without just cause is widely held and commonly seen as an obligation constraining employer behavior.[288] Professor Kim suggests that routine practices in the workplace, such as an employer's promotion of a corporate culture emphasizing teamwork, loyalty, and fairness, reinforce and perpetuate this confusion.[289] Research by social psychologists further demonstrates that once people form beliefs and rely on them, they are likely to continue to hold those beliefs even after they are presented with evidence that those beliefs are mistaken.[290]

Unfortunately, little empirical research demonstrates the specific expectations that workers have related to retiree welfare benefits.[291] No studies of worker expectations have conclusively proven that ex-

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[284] *See id.* at 479. The scope of this Note does not allow for an in-depth discussion of social norms in the employment relationship. The main themes of the topic will be addressed here, but for an extensive consideration of norms, see Symposium, *Law, Economics & Norms*, 144 U. PA. L. REV. 1643 (1996).

[285] *See* Edward B. Rock & Michael L. Watchter, *The Enforceability of Norms and the Employment Relationship*, 144 U. PA. L. REV. 1913, 1915 n.6 (1996). Some ILM rules include the understanding that "wages increase with seniority, firms lay off employees in a downturn following a seniority schedule, firms discharge employees rather than reduce their wages if the firms prove that employees are shirking, and permanently laid-off workers receive some severance pay." *Id.* at 1927.

[286] *See id.* at 1930–31.

[287] *See* Kim, *supra* note 276, at 480.

[288] *Id.* at 487. Professor Kim cites a study where 95% of those surveyed believed legal discharges without cause *should* be unlawful. This was roughly the same percentage of workers in Kim's survey who mistakenly believed that termination without cause *was* illegal and demonstrates widespread acceptance of the just cause norm. *See id.* at 486.

[289] *Id.* at 494. Confusion can also be perpetuated by employers who breach the norm by terminating employees arbitrarily and then justify the termination as for cause so the remaining employees will not be upset by the action. Thus, the employees may not have realized fellow employees were being fired without cause. *Id.* at 494–95.

[290] *See* Kim, *supra* note 276, at 495–96.

[291] *See* Kupferberg, *supra* note 17, at 498.

pectations of continued benefits constitute a norm that workers will confuse with a formal legal rule.[292] Professor Kim also cautions that because norms are highly context specific, her study in the employment at will context is "too narrow to support any systematic theory of when and under what conditions such confusion [of law and norms] will occur."[293] Therefore, it cannot be maintained that continued retiree health benefits are a social norm that courts ought to protect based solely on Professor Kim's research.[294]

Parallels between the employment at will context and the subject of welfare benefits litigation suggest, however, that confusion of a social norm and formal legal rules may have occurred.[295] Because they are both elements of the employment relationship, it seems unlikely that workers would so greatly misunderstand employment at will but have a fully realistic picture of employee benefits.[296] Professor Kim considers it plausible for workers to confuse norms and law "where norms are strongly held, widely shared and regularly reinforced by routine, observable practices."[297] As Part I indicated, throughout most of the unionized workplace's history, employers and employees mutually accepted the existence of continuing retiree benefits.[298] Even after *Pittsburgh Plate Glass* freed employers from any legal requirement to bargain with unions over retiree health benefits, many continued to do so because they feared the informal sanctions they might face for refusing to deal with unions over the issue.[299]

Seeing lifetime benefits as a workplace norm explains why it is reasonable for recent retirees to continue to have expected such

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[292] One empirical study finds workers have little understanding of their pension plans, a benefit similar to the welfare benefits at issue here. As might be expected, younger, active employees have little understanding of these benefits, making it less likely that they have sufficient information to protect their benefits throughout their careers. *See* Andrew A. Luchak & Morley Gunderson, *What Do Employees Know About their Pension Plan?*, 39 INDUS. REL. 647, 664 (2000).

[293] Kim, *supra* note 276, at 493.

[294] *See id.*

[295] *See infra* notes 296–299.

[296] *See* Kim, *supra* note 276, at 484 (describing similar operation of norms in ILM).

[297] *Id.* at 493–94.

[298] *See supra* notes 30–57 and accompanying text.

[299] *See* John Morrell & Co. v. United Food and Commercial Workers Int'l Union, AFL-CIO, 37 F.3d 1302, 1311–12 (8th Cir. 1994) (Heaney, J., dissenting). (Employer "had a perfect opportunity . . . to unilaterally terminate health benefits for retirees in 1971 when *Pittsburgh Plate Glass* was decided by the Supreme Court. It failed to do so and instead continued to bargain with the Union with respect to retiree health benefits and to honor retirees' health benefit claims without interruption.").

benefits, despite changes in the environment around them.[300] Such benefits sparked employee expectations of legal rights, despite formal legal rules allowing employers to terminate benefits unilaterally or a recent trend suggesting employees should no longer expect such benefits.[301] Like workers in Professor Kim's study, retirees who spent years in a union workplace would have had a strong belief that their benefits would continue, and, rather than change their long-standing beliefs in the face of information that challenged them, they likely discounted the new information as inapplicable to their circumstances.[302] Under a theory that retirees' attitudes toward benefits are similar to mistaken beliefs regarding the protections the law provides in employment at will situations, one sees that employees would have continued to believe that they would receive benefits even after the conditions giving rise to those expectations ceased to exist.[303]

The most important implication of retirees' failure to understand the vulnerability of benefits is that they would have been unlikely to take steps to provide for their own retirement health needs.[304] If they believed that lifetime health coverage would continue and the language of an ambiguous collective bargaining agreement failed to clearly correct this misunderstanding, workers would have had little incentive to prepare for the costs that they would face during retirement.[305] Thus, if courts fail to protect their expectations where the collective bargaining agreement is silent or ambiguous, retirees will be whipsawed for relying on reasonable expectations that were never properly dispelled: the employer can terminate retiree benefits and the retirees, at an advanced age and on a fixed income, must procure expensive supplemental insurance on their own.[306] Evidence that workers misunderstand their retiree benefits in the same way they overestimate their rights in the employment at will context provides courts with a reasonable and equitable justification for presumuing the benefits vested: retirees should not be forced to bear the entire cost of a legitimate misunderstanding regarding the benefits' duration.[307]

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[300] *See* Kim, *supra* note 276, at 493–95.

[301] *See id.* (describing how workers retain norms despite evidence challenging them).

[302] *See id.* at 495–96.

[303] *See id.*

[304] *See* Kim, *supra* note 276, at 496 (noting employees are unlikely to take action to solve workplace problems that they do not understand to exist).

[305] *See* Brouwer, *supra* note 5, at 1000.

[306] *See* Berneking, *supra* note 5, at 268.

[307] *See Bidlack*, 993 F.2d at 613 (Cudahy, J., concurring); *Roth*, 614 N.W.2d at 472.

Critics may argue alternatively that even if the context of the union workplace justifies the subjective expectations of retirees, such factors cannot demonstrate that employers also shared such expectations and agreed to provide lifetime benefits.[308] They maintain that the intent of the employer, of course, can be safely presumed to be precisely the opposite.[309] When agreements are silent, however, courts should determine not what the parties may have preferred at the formation of the agreement, but what they would have agreed to when the agreement was reached.[310] If the agreement were reached when continued retiree health benefits still constituted a workplace norm, the continued benefits should be binding on employers as well, despite the existence of formal legal rules allowing them to terminate benefits under some circumstances.[311] Judge Cudahy points out that even after the Supreme Court ruled that employers could unilaterally modify benefits in *Pittsburgh Plate Glass*, employers were not necessarily free to terminate benefits.[312] The expectations of lifetime benefits were so commonly held that at the formation of these contracts both the employees and the employers viewed the benefits as vested.[313] Even in the late 1980s, workplaces could still have operated under a norm of continued retiree benefits.[314] Should empirical research establish that the expectations were so widely held so as to constitute a social norm, it is for the employer to make a showing that, in a specific workplace, those expectations were incorrect and properly dispelled.[315]

Whether courts should protect employee and retiree expectations of continued benefits also depends upon whether the norms are self-enforcing.[316] When norms are self-enforcing, the workplace's in-

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[308] *See* Weeks, *supra* note 93, at 496–97, 503.

[309] *Id.* at 496–97.

[310] *See id.* at 503.

[311] *See* Kim, *supra* note 276, at 484–85.

[312] Cudahy points out that the employer in *Pittsburgh Plate Glass* only wanted to replace the benefits it was providing to retirees with benefits from Medicare, meaning the overall level of benefits would remain unchanged. *See Bidlack*, 993 F.2d at 613 n.4 (Cudahy, J., concurring) (citing Allied Chem. & Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157, 157 (1971)). The employer never intended to reduce negotiated benefits or to terminate such benefits. *See id.*; *see also Morrell*, 37 F.3d at 1311–12 (Heaney, J., dissenting) (arguing continuation of benefit belies understanding that benefits were not vested).

[313] *See Bidlack*, 993 F.2d at 613 (Cudahy, J., concurring).

[314] *See id.* (Cudahy, J., concurring) (stating trend of continuing benefits extended into at least mid-1980s); *see also supra* notes 51–57 and accompanying text.

[315] *See id.* (Cudahy, J., concurring); *see also supra* notes 51–57 and accompanying text..

[316] *See* Rock & Watchter, *supra* note 285, at 1947.

formal mechanisms are sufficient to require each side of the employment relationship to fulfill its obligations.[317] When informal workplace mechanisms enforcing these social norms fail, the norms will not be respected.[318] In such cases, there is the opportunity for one side of the relationship to be opportunistic and violate norms that they would otherwise be expected to uphold.[319] Because the norm is based on the nature of the ILM and not on the law, nothing prevents an opportunistic party from violating the norm in the absence of self-enforcement.[320] If this occurs, it may be necessary for the law to step in and enforce the norms so that one side does not take advantage of the other.[321]

Arguably, employees' most potent method of self-enforcement of norms is union action.[322] Although unions represent workers in cases like *Yard-Man*, a norm of continued benefits still might not be self-enforcing.[323] Legally, as a result of the holding in *Pittsburgh Plate Glass* which made retiree health benefits a permissive subject of bargaining, unions' ability to discuss proposed changes to these benefits is minimal, and any economic pressure they might bring over the issue is unprotected.[324] Practically, unions may be unable to effectively enforce the norm of continued benefits where it existed due to their increasing weakness in American workplaces.[325] The decline in retiree welfare benefits discussed in Part I has closely trailed the decline in union strength during the last two decades.[326] While a strong union like the UAW may occasionally be able to enforce a norm of continued benefits for its retirees through internal mechanisms, such cases

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[317] *See* Walter Kamiat, *Labor and Lemons: Efficient Norms in the Internal Labor Market and the Possible Failures of Individual Contracting*, 144 U. PA. L. REV. 1953, 1957 (1996); *see also* Kim, *supra* note 276, at 503–04.

[318] *See* Kamiat, *supra* note 317, at 1957.

[319] *See* Rock & Watchter, *supra* note 285, at 1947.

[320] *See* Kamiat, *supra* note 317, at 1955.

[321] *See id.* at 1968; *see also* Kim, *supra* note 276, at 498–99 (discussing arguments of those who reject formal legal rules when incongruous with social norms). Some critics reject this point because they fear courts will be too meddlesome and unable to efficiently enforce the norms, even when norms are not self-enforcing. *See* Rock & Watchter, *supra* note 285, at 1950–51.

[322] *See* Rock & Watchter, *supra* note 285, at 1947 (advocating unionism as method of self-enforcement); *see also* Kamiat, *supra* note 317, at 1969.

[323] *See Yard-Man*, 716 F.2d at 1482; *Roth*, 614 N.W.2d at 472.

[324] *See supra* notes 74–90 and accompanying text.

[325] *See* Charles G. Bakaly, Jr., *A Response to Murphy's Law*, *in* AMERICAN LABOR POLICY 91–92 (Charles J. Morris ed., 1985).

[326] *See id.*

are the exception.[327] Most unions are unable to expend their limited resources fighting for retirees when they have an express duty to represent active employees.[328] Finally, unions do not have a duty to represent the interests of retirees.[329] Lacking such a duty, even a strong, influential union could easily opt not to enforce the norms of the unionized relationship relating to retirees.[330] For these reasons, norms obligating employers to provide lifetime benefits may not be self-enforcing, thus making the courts an appropriate third-party enforcer of the obligation to prevent employer opportunism.[331]

C. *Special Considerations Due to the Collective Bargaining Relationship*

Because the union bargaining relationship is unique, there are special considerations for courts considering whether benefits vest.[332] The *Yard-Man* approach of protecting vulnerable benefits is, in part, premised on the fact that unions have no duty to protect them in future bargaining.[333] As the Supreme Court in *Pittsburgh Plate Glass* specificly recognized, the "risk cannot be overlooked that union representatives on occasion might see fit to bargain for improved wages or other conditions favoring active employees at the expense of retirees' benefits."[334] Because retirees earned these benefits in the past by trading away wages for the benefits in the form of deferred compensation, courts like the Sixth Circuit hold that the retirees would have expected these benefits to vest because the union would not protect them.[335] The *Roth* court further noted that because unions have no duty to represent retirees, a presumption of vesting "serves to protect the voiceless in the subsequent negotiating process."[336] Moreover, because the parties to the agreement reasonably know that this expectation would arise, courts must conclude the inclusion of

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[327] *See* Blumenstein, *supra* note 83, at A1.

[328] *See* Bureau of Nat'l Affairs, *IBT Locals Now Electing Convention Delegates*, BNA LAB. REL. REP., Mar. 18, 1996, at d-21 (discussing cash-strapped Teamsters' need to increase dues to replenish strike fund and finance union operation).

[329] *See Pittsburgh Plate Glass*, 404 U.S. at 172–73.

[330] *See Roth*, 614 N.W.2d at 473.

[331] *See* Kamiat, *supra* note 317, at 1967–68.

[332] *See* Weckstein, *supra* note 11, at 126; Weeks, *supra* note 93, at 503.

[333] *See Yard-Man*, 716 F.2d at 1482.

[334] *See Pittsburgh Plate Glass*, 404 U.S. at 173.

[335] *Yard-Man*, 716 F.2d at 1482.

[336] *See Roth*, 614 N.W.2d at 473.

benefits in the contract by the parties is evidence of intent for the benefits to vest.[337]

Critics of *Yard-Man* state that because these cases are a matter of contract under the collective bargaining agreement, retirees already had the opportunity to protect this delayed compensation and obtain vested benefits in the negotiation process.[338] For example, the Third Circuit in *Skinner Engine* was unpersuaded by the *Yard-Man* court's reasoning that because retirees would not be represented by the union in future bargaining, the expectation of the benefits should be protected by vesting.[339] It rejected the *Yard-Man* approach by noting that because the retirees affected by the employer's reduction of the benefits were active employees when the collective bargaining agreements in question were formed, they could have pressured the union to press for vested rights.[340] The fact that they did not indicated that they consciously accepted the stated terms of the contract, and that they should bear the burden of the choice not to push for the vesting language.[341]

Considering continued benefits as a social norm of the unionized workplace addresses this criticism, however.[342] The *Skinner Engine* court's argument assumes that retirees considered the possibility that the benefits could be taken away and consciously chose to not take steps to protect them.[343] If Professor Kim's research demonstrating the inability of workers to understand their legal rights is applicable to this element of the employment relationship, the lack of contractual vesting language cannot be evidence of a conscious acceptance of terminable benefits.[344] Like workers who misunderstand employers' duties under employment at will, union employees would not consider it necessary to press their representatives for a clause protecting benefits that they assumed would continue.[345] Under the norms of the unionized workplace, the continuation of benefits was understood.[346] The employees would not have sought language to protect something

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[337] *See Yard-Man*, 716 F.2d at 1482.
[338] *See Skinner Engine*, 188 F.3d at 141.
[339] *See id.*
[340] *See id.*
[341] *See id.*
[342] *See infra* notes 343–349.
[343] *See Skinner Engine*, 188 F.3d at 141.
[344] *See* Kim, *supra* note 276, at 405–06.
[345] *See id.* at 480.
[346] *See Bidlack*, 993 F.2d at 613 (Cudahy, J., concurring).

they never anticipated was vulnerable.[347] Additionally, where the contract was ambiguous about the duration of benefits, the union members' misunderstanding may not have been adequately dispelled.[348]

Another response to the critics' argument is that it assumes that while the retirees were active employees they were aware of and closely monitored the union's bargaining positions.[349] It is more reasonable to suppose that they opted to allow their representatives to negotiate the technical details of the contract and did not authorize every move the negotiators made.[350] Because the Third Circuit adopted a strong presumption that benefits did not vest, it required the retirees to present clear contract language demonstrating an intent to vest benefits before it would consider evidence extrinsic to the contract.[351] Thus, the court never considered extrinsic evidence to determine if, while they were active employees, the retirees either consciously consented to language that did not expressly vest the benefits or that they understood the benefits were not guaranteed for life.[352]

Finally, critics of the *Yard-Man* approach dispute the validity of attempts to determine the parties' obligations by looking for an intent in ambiguous collective bargaining agreements.[353] They assert that because a collective bargaining agreement is created within the context of an ongoing relationship, the parties do not negotiate under an assumption that this will be the last time they will discuss an issue.[354] Therefore, they would never have considered what would happen if the relationship ended and neither party is likely to express its view about the duration of retiree benefits at the time.[355] Thus, the document cannot exhibit an intent as to what would happen if this were the last contract.[356] Considering factors like expectations to determine intent is wrong because courts can only speculate what the parties would have agreed upon and will interpret the contract based on

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[347] *See* Kim, *supra* note 276, at 505–06.

[348] *See* Berneking, *supra* note 5, at 286 (citing *Morrell*, 37 F.3d at 1313–14 (Heaney, J. dissenting)).

[349] *See id.*

[350] *See id.* (citing *Morrell*, 37 F.3d at 1313–14 (Heaney, J., dissenting)); *see also* Luchak & Gunderson, *supra* note 292, at 466 (finding workers who are several years away from retirement have little knowledge or understanding of retirement pension benefits).

[351] *See Skinner Engine*, 188 F.3d at 140–43.

[352] *See id.* at 140.

[353] *See* Weckstein, *supra* note 11, at 123–24; Weeks, *supra* note 93, at 502.

[354] *See* Weckstein, *supra* note 11, at 123–24; Weeks, *supra* note 93, at 502.

[355] Weeks, *supra* note 93, at 491, 493.

[356] *See id.* at 493.

their own policy orientations.[357] These critics find it likely, therefore, where the words of the agreement provide no clear guide, any intent the court deciphers will not be one which was in the minds of the parties, but one constructed by judicial imagination.[358]

This lack of discernable intent, while perhaps true, however, only strengthens the need for courts to look beyond the actual language of the collective bargaining agreement if it does not unambiguously dictate whether the benefits should vest.[359] If no intent is readily expressed through the language of the collective bargaining agreement, courts should attempt to determine what the parties would have agreed to in the absence of contractual language.[360]

Many authorities indicate that it is appropriate for courts to consider expectations when interpreting a collective bargaining agreement because such an approach comports with an accurate view of the nature of such agreements.[361] In *United Steelworkers v. Warrior & Gulf Navigation, Co.*, the Supreme Court recognized that collective bargaining agreements are efforts "to erect a system of industrial self-government."[362] Archibald Cox, one of the foremost experts in American labor law, described the complexity of collective bargaining agreements by stating that with the possible exception of the tax code, "no state or federal statute . . . covers as wide a variety of subjects or impinges on as many aspects [of the workplace]" as such agreements.[363] Because this complex agreement must be short and simple enough for the average worker to comprehend, however, it will inevitably be incomplete.[364] Thus, the words of the collective bargaining agreement cannot constitute the exclusive source of the rights and duties under the contract.[365] Instead, "the law of the shop" and the informal rules of the employment relationship that cannot be contained in the express language of the agreement should be considered to determine what the parties expected.[366] When the document

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[357] Weckstein, *supra* note 11, at 127.

[358] *See id.* at 123–24 (citing arbitration opinion by Professor Clyde Summers, Roxbury Carpet Co., 73–2 Lab. Arb. Awards (CCH) ¶ 8521, at 4937 (Oct. 26, 1973)).

[359] *See* Archibald Cox, *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1482, 1490–93 (1959).

[360] *See* Weeks, *supra* note 93, at 503.

[361] *See* Zimarowski, *supra* note 99, at 479; *see also Keffer*, 872 F.2d at 64.

[362] United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 580 (1960).

[363] *See* Cox, *supra* note 359, at 1490.

[364] *See id.*

[365] *See id.* at 1498–99.

[366] *See Warrior & Gulf Navigation*, 363 U.S. at 580–81.

is silent or unclear due to its numerous generalities, deliberate ambiguities and gaps, the background of the workplace is used to fill in the gaps.[367] In *Bidlack*, Judge Cudahy argued a similar point and noted that when agreements are silent as to what the parties agreed, the courts must look to the assumptions that they shared in the "prevailing conventions in the relevant community of discourse."[368] Because norms of the ILM, and expectations based upon them, are an essential part of the background of the workplace, they are a crucial source for determining what happens in the event no discernable intent can be found.[369] By considering these expectations, courts are able to interpret the contract with a more complete view of the bargaining relationship.[370]

IV. The Remaining Challenge to an Expectations Analysis: A Vesting Presumption and Federal Labor Policy

A. *An Inference or Presumption of Vesting*

Since creating the "*Yard-Man* Inference" in *UAW v. Yard-Man, Inc.*, the Sixth Circuit has insisted that its approach does not presume that health benefits continue for the retiree's life merely because such benefits are included in a collective bargaining agreement.[371] Rather, the court inferred an intent that benefits vest from the existence and nature of the benefits the union and the employer provided.[372] The difference, at least in theory, is crucial. As an "inference," the *Yard-Man* approach requires retirees to point to other language in the contract indicating an intent to vest and merely buttresses an otherwise sufficient attempt to prove the benefits vested.[373] If the *Yard-Man* approach is a presumption, however, the court presumes that the benefits vested and then the employer must disprove that presumption and demonstrate the benefits did not vest.[374] Although each cited *Yard-Man*, both the concurrence in *Bidlack v. Wheelabrator Corp.* and

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[367] *See* Cox, *supra* note 359, at 1493.

[368] *See Bidlack*, 993 F.2d at 613 n.3 (Cudahy, J., concurring) (citing Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 Va. L. Rev. 821, 902 (1992)).

[369] *See* Cox, *supra* note 359 at 1493.

[370] *See Keffer*, 872 F.2d at 64.

[371] UAW v. Yard-Man, Inc., 716 F.2d 1476, 1482 (6th Cir. 1983).

[372] *See id.*

[373] *Id.*

[374] *See, e.g.*, Bidlack v. Wheelabrator Corp., 993 F.2d 603, 613 (7th Cir. 1993) (Cudahy, J., concurring).

the *Roth v. City of Glendale* court created presumptions that took effect after the plaintiffs demonstrated the agreement was silent or ambiguous regarding the duration of benefits.[375] They presume the benefits were interminable and require the employer prove by extrinsic evidence that the employees' expectations were incorrect and that the parties never intended to vest the benefits.[376]

In *Yard-Man* and subsequent cases, however, the Sixth Circuit has consistently denied creating such a burden-shifting presumption because it could not identify a federal labor policy "presumptively favoring interminable rights." [377] Without such a labor policy, the court was vulnerable to criticisms that it was interpreting collective bargaining agreements in violation of traditional contract principles without a clear mandate from Congress.[378] Critics reject shifting the burden to the employer because it requires a defendant to disprove that it granted a contractual benefit rather than requiring plaintiffs to prove such benefits were provided.[379]

Despite the Sixth Circuit's insistence that the "*Yard-Man* Inference" does not create a presumption, courts and commentators who both endorse and criticize *Yard-Man* have labeled the inference a rebuttable presumption that employers are required to disprove.[380] The courts in both *Anderson v. Alpha Portland Industries, Inc.* and *UAW v. Skinner Engine Co.* held that such a presumption would undermine contract law.[381] Even supporters of the *Yard-Man* approach refer to the "*Yard-Man* Inference" as a rebuttable presumption that benefits vest and that the employer must prove that the benefits were never intended to do so.[382]

The reason that few courts beyond the Sixth Circuit accept its distinction between an inference and a presumption is that if one ac-

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[375] *See id.* (Cudahy, J., concurring) (favoring weak vesting presumption); Roth v. City of Glendale, 614 N.W.2d 467, 472 (Wis. 2000) (adopting reasoning in *Bidlack* concurrence).

[376] *Bidlack*, 993 F.2d at 613 (Cudahy, J., concurring).

[377] *See* Maurer v. Joy Tech. Inc., 212 F.3d 907, 915 (6th Cir. 2000); UAW v. BVR Liquidating, Inc., 190 F.3d 768, 772 (6th Cir. 1999); Golden v. Kelsey-Hayes Co., 73 F.3d 648, 656 (6th Cir. 1996); *Yard-Man*, 716 F.2d at 1482; *see also* Berneking, *supra* note 5, at 273 (citing Sixth Circuit caselaw stating inference does not shift burden to employer).

[378] *See* Rogers, *supra* note 11, at 1070–71.

[379] *See id.* at 1053 (citing E. ALLAN FARNSWORTH, CONTRACTS §§ 3.1, 3.3 (1982)).

[380] *See* Fisk, *supra* note 5, at 176 (labeling "*Yard-Man* Inference" as strong vesting presumption); Rogers, *supra* note 11, at 1034. *But see* Berneking, *supra* note 5, at 273 (citing Sixth Circuit caselaw stating inference does not shift burden to employer).

[381] *See* UAW v. Skinner Engine Co., 188 F.3d 130, 140–41 (3d Cir. 1999); *see also* Anderson v. Alpha Portland Indus., Inc., 836 F.2d 1512, 1517 (8th Cir. 1988).

[382] *See Bidlack*, 993 F.2d at 613 (Cudahy, J., concurring); *Roth*, 614 N.W.2d at 472.

cepts that *Yard-Man* only creates an inference that buttresses other contractual evidence, it and the expectations mean nothing.[383] The opinion states that an inference can only support a showing already sufficient to prove the retirees' case and that the inference based on retirees' expectations only allowed for the court's finding that the benefits had vested because additional factors, such as the past practice of the employer and the lack of specific durational limitations on welfare benefits, also supported that finding.[384] By recognizing the legitimate expectations that employees had in the bargaining context and requiring the employer to show that the expectations were incorrect, Cudahy's opinion is really a more straightforward means to accomplish what the *Yard-Man* court sought to do with the inference.[385] The interpretation of *Yard-Man* as truly a presumption is also more consistent with the way subsequent courts have applied the "*Yard-Man* Inference," despite the characterization that the Sixth Circuit has given to the approach.[386]

B. *Federal Labor Policy*

Characterizing the *Yard-Man* approach as a presumption, however, should not sound a death knell for attempts to protect worker expectations of continued benefits.[387] As *United Steelworkers v. Warrior & Gulf Navigation Co.* established, courts interpreting collective bargaining agreements under section 301 may establish presumptions if those presumptions are needed to fulfill Congress's labor policies.[388] Cases in which the problems lack express statutory sanction will be resolved by looking to the legislation's policy and fashioning remedies to effectuate that policy.[389] In other words, before the courts consider retiree expectations, they must determine whether such an approach would "denigrate or contradict a federal labor policy."[390] Critics of the *Yard-Man* approach assert that there is no federal labor policy supporting a presumption of vesting and that federal labor policy actually

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[383] *See Yard-Man*, 716 F.2d at 1482.

[384] *See id.* at 1480–81.

[385] *See Bidlack*, 993 F.2d at 613 (Cudahy, J., concurring).

[386] *See* Weeks, *supra* note 93, at 502; *see also* Weckstein, *supra* note 11, at 127.

[387] *See infra* notes 388–416 and accompanying text.

[388] *See* United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 577–78 (1960).

[389] *See* Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 457 (1957).

[390] *See Yard-Man*, 716 F.2d at 1480.

prevents it.[391] They argue that because ERISA does not provide for vesting of welfare benefits, no federal labor policy could support a presumption of vesting.[392] Additionally, because Congress considered requiring vesting of welfare benefits but rejected it in 1974, they read ERISA to bar courts from presuming that retiree benefits vest if the contract that granted them is ambiguous.[393]

This view reads the purposes and policies of ERISA too narrowly and exaggerates the force of the presumption that courts should apply.[394] When Congress considered welfare benefits in 1974, the situation was vastly different from today because, at the time, health benefits for retirees were of relatively little importance and unlikely to be cut by employers due to their low cost.[395] Pensions, on the other hand, were a massive expense for employers, and numerous retirees found their expectations of employer-provided retirement income disappointed.[396] Because welfare benefits were less expensive and, therefore, less threatened than pensions, Congress exempted welfare benefits from ERISA's pension vesting procedures, reflecting its judgment that, at the time, any threat to continued health benefits was less significant than the added costs and administrative difficulties that would be imposed on employers if vesting were mandated.[397]

While Congress's main concern at ERISA's passage was the protection of retirement income through pensions, this does not imply, however, that Congress did not also intend to protect additional benefits.[398] As other commentators have noted, ERISA's legislative history and structure indicate its drafters realized that they could not anticipate all future issues related to retiree benefits and thus expected courts would use their power to create federal common law to further protect what the statute did not.[399] One of ERISA's sponsors stated that claims related to ERISA should be dealt with "in similar fashion to those brought under Section 301 of the (LMRA)."[400] By

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[391] *See Skinner Engine*, 188 F.3d at 140–41; *see also Anderson*, 836 F.2d at 1517; Rogers, *supra* note 11, at 1070–71.

[392] *See Skinner Engine*, 188 F.3d at 140–41.

[393] *See id.*

[394] *See Bidlack*, 993 F.2d at 613 (Cudahy, J., concurring); Fisk, *supra* note 5, at 166; *see also* Berneking, *supra* note 5, at 285.

[395] *See supra* notes 32–33 and accompanying text (reporting employers' costs for health cases were relatively low).

[396] Fisk, *supra* note 5, at 166.

[397] *Id.*

[398] *See id.*

[399] *See id.*; Brouwer, *supra* note 5, at 988.

[400] *See* Brouwer, *supra* note 5, at 989.

granting courts the same power to create federal law under ERISA that it does under the LMRA, Congress signaled its intention that courts "safeguard workers against loss of their earned or anticipated benefits."[401] Now that changed conditions threaten the earned and reasonably anticipated health benefits of retirees, just as pension plans were threatened in the 1970s, courts should exercise the power granted to them under section 301 and ERISA to adapt federal law to these changed circumstances.[402] The need to protect retirees' reasonable expectations is a situation Congress sought to provide for when it gave courts the power to create federal law to fill in ERISA's gaps.[403] While courts should not hunt for national labor policies that do not exist, there is little reason to think an accurate understanding of the context in which these benefits were provided would not comport with federal labor policy.[404] So long as an interpretation does not "denigrate or contradict basic principles of federal labor law," it should be acceptable.[405] Until Congress amends ERISA to protect retiree welfare benefits, courts must do so by using their power to fashion a federal common law that respects reasonable expectations of retirees.[406]

Moreover, despite the charges of its critics, the presumption suggested here is a minimal protection.[407] First, while critics recite a litany of evils that will result if courts adopt anything short of a strong presumption against vesting, including crushing employer liabilities, union opportunism and skyrocketing health costs, one court has keenly noted that such predictions assign "an awful lot of weight to a rule that parties are free to change by contract."[408] Any employer and union wishing to contract around a weak vesting presumption can easily do so by drafting an unambiguous contract that ensures benefits do not vest.[409] Second, the presumption only applies after retirees can

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[401] Fisk, *supra* note 5, at 169 (quoting ERISA's sponsor, Senator Jacob Javits).

[402] *See id.* at 166.

[403] *See id.*; *see also* Fox Valley & Vicinity Const. Workers Pension Fund v. Brown, 897 F.2d 275, 281 (7th Cir. 1990) (finding where ERISA is silent, courts must create federal law).

[404] *See* Cox, *supra* note 359, at 1498–99 (advocating arbitration because consideration of workplace is necessary to understand collective bargaining agreement).

[405] *Yard-Man*, 716 F.2d at 1480.

[406] *See supra* note 119 (discussing Emergency Retiree Health Benefit Protection Act).

[407] *See Bidlack*, 993 F.2d at 613 (Cudahy, J., concurring).

[408] *See id.* at 609.

[409] *See id.* Note that *Pittsburgh Plate Glass* is premised on both the conflict between the interests of active union members and retirees and unions' willingness to protect active workers' wages by sacrificing retiree benefits. *See supra* note 87. If *Pittsburgh Plate Glass* is

prove that the agreement creating the benefits is silent or ambiguous regarding the duration of benefits.[410] Thus, an unambiguously-worded agreement stating that benefits terminate at the end of the expiration of the agreement would be sufficient to inform retirees that the benefits are not vested.[411] Furthermore, due to the costs of today's retiree benefits, new labor contracts are unlikely to fail to clearly define the benefits duration.[412] Thus, the number of cases where this presumption will be necessary will eventually dwindle.

Finally, because this Note advocates a weak presumption, even if a court finds the agreement ambiguous, an employer need only produce evidence that the expectations of the workers were not objectively reasonable.[413] The employer could do this by citing the bargaining history of the firm, the absence of a recent trend of secure benefits or other workplace policies tending to show that that specific workplace did not exhibit a "strongly held and widely shared" norm sufficient to generate and support expectations of continued benefits.[414] Based on the recent and current trends in retiree health benefits, this burden will not be great, but it will be sufficient to protect those workers whose bargaining environments legitimately continued to promote a norm of lifetime benefits that has been a common element of the unionized workplace since its inception.[415] Overall, a weak vesting presumption encourages employers to clearly and fully define the obligations they owe to their employees so that future retirees will have adequate notice of their rights and will not be penalized for their high hopes.[416]

CONCLUSION

While additional research is needed to confirm it, evidence suggests that continued employer-provided retiree benefits has been a norm of the unionized workplace and, until only recently, workers

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correct, it is reasonable to assume that unions would be willing to agree to a contract that unambiguously allows employers to make unilateral changes to retiree benefits.

[410] *See id.* at 613 (Cudahy, J., concurring) (stating that presumption would apply only if agreement is silent or ambiguous); *Roth*, 614 N.W.2d at 472.

[411] *See Bidlack*, 993 F.2d at 613 (Cudahy, J., concurring); *Roth*, 614 N.W.2d at 472.

[412] *See* Kupferberg, *supra* note 17, at 501.

[413] *See Bidlack*, 993 F.2d at 613 (Cudahy, J., concurring); *Roth*, 614 N.W.2d at 472.

[414] *See* Kim, *supra* note 276, at 493–94 (discussing elements of the workplace setting that are necessary for norms and laws to be confused).

[415] *See supra* notes 30–68, 295–303 and accompanying text.

[416] *See* Kim, *supra* note 276, at 504–05 (finding evidence that workers' confusion of norms with legal rules prevents them from taking action to protect their interests).

and employers lived under an assumption that this norm should be respected. Due to the decline in union power, this norm is no longer self-enforcing for those retirees whose expectations of lifetime benefits were not dispelled by clear contractual language. Absent Congressional action protecting these benefits, courts must step in and enforce these norms to accomplish Congress's goal to "safeguard workers against loss of their earned or anticipated benefits." A rebuttable presumption that benefits vest guarantees that retirees who relied upon this norm will not fall victim and that future retirees will be put on clear notice if their benefits are vulnerable. This presumption also respects the negotiated language of unambiguous contracts, but not by ignoring workers' expectations or the context of the unionized workplace, which are both crucial to accurately understanding ambiguous collective bargaining agreements. Critics of this presumption might suggest that it undermines legitimate contracts and twists the "law" toward a policy preference. Because the approach advocated here protects the health and security of working-class retirees, such a narrow view of employer obligations is, perhaps, to be expected.

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